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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946 47

No. 861 16

PRIEBE & SONS, INC., PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 7, 1947.

CERTIORARI GRANTED MARCH 10, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 861

PRIEBE & SONS, INC., PETITIONER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 45922

PRIEBE & SONS, INC., an Illinois Corporation,

vs.

THE UNITED STATES

HISTORY OF PROCEEDINGS

The original petition was filed July 28, 1943.

On March 1, 1944, on motion made therefore and allowed by the court, the plaintiff filed an amended petition which is as follows:

AMENDED PETITION—Filed March 1, 1944

To the Court of Claims of the United States, and to the Honorable, the Chief Justice and the Judges thereof:

The above-named plaintiff files this amended petition, with leave of this Court first obtained, and respectfully shows:

1. The plaintiff at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the City of Chicago and State of Illinois.

2. The jurisdiction of this Court is predicated upon the fact that the claim hereinafter set forth is founded upon a [fol. 2] contract entered into between the plaintiff and Federal Surplus Commodities Corporation, an agent and instrumentality of the United States duly authorized and acting for and in behalf of the United States. Federal Surplus Commodities Corporation will hereinafter be referred to as "FSCC," and is more specifically and particularly described in paragraph 3 of this petition.

3. Plaintiff avers that Federal Surplus Commodities Corporation (herein called "FSCC") was incorporated under the laws of Delaware on October 4, 1933, under the name of "Federal Surplus Relief Corporation," and was incorporated as a non-stock, non-profit, membership corporation; that its members were at that time the Secretary

of Agriculture, the Administrator of Federal Emergency Relief Administration, and the Administrator of the Public Works Administration, and that on November 18, 1935, the name of the corporation was changed to its present name, to-wit, "Federal Surplus Commodities Corporation," and thereupon its members were the Secretary of Agriculture, the Administrator of the Agricultural Adjustment Administration, and the Governor of the Farm Credit Administration; that in 1937, by an Act of Congress, the Federal Surplus Commodities Corporation was designated an agency of the Federal Government under the direction of the Secretary of Agriculture for a period of two years, and that by said Act the Secretary was authorized to transfer to FSCC the funds used for market improvement purposes provided [fol. 3] in Section 32, Public 320, such funds to be used in procuring commodities, and that in 1938, in connection with the enactment of general legislation in aid of agriculture, Congress extended the operations of FSCC until 1942, its general functions to remain the same; that by an Act of Congress on June 27, 1942, the Federal Surplus Commodities Corporation was continued as an agency of the United States under the direction of the Secretary of Agriculture until June 30, 1945, and plaintiff avers that when FSCC entered into the aforesaid contract it was duly authorized to do so by the United States, and that all of its subsequent actions thereunder were for and in behalf of the United States and duly authorized by the United States.

4. Previous to April 22, 1942, the Agricultural Marketing Administration, an agent and instrumentality of the United States duly authorized and acting for and in behalf of the United States, broadcast to the public, Announcement FSC-553 (hereinafter called "Announcement"), a copy of which is hereto attached and marked Exhibit "A." On the aforesaid date the plaintiff submitted to Agricultural Marketing Administration an offer to sell, in accordance with the terms of the Announcement, certain dried whole eggs. The plaintiff's offer was by wire, a copy of which is hereto attached and marked Exhibit "B." Said offer was amended in a slight detail by plaintiff on this same day by wire, a copy of which is hereto attached and marked Exhibit "C." The said offer was accepted by the Agricultural Marketing Ad- [fol. 4] ministration by wire on, to-wit, April 23, 1942. Said acceptance by wire is marked Exhibit "D" and at-

tached hereto. The aforesaid acceptance resulted in a contract between the plaintiff and Federal Surplus Commodities Corporation, and, as provided in the Announcement, the Announcement itself, the plaintiff's offer by wire, the amendment of plaintiff's offer, and Agricultural Marketing Administration's wire of acceptance, together constitute the written contract between the parties, that is, between the plaintiff and FSCC. Such contract was designated by FSCC "Contract FSC-22289."

5. Under the terms of the aforesaid contract the plaintiff contracted to sell, and FSCC contracted to buy, numerous lots of dried eggs for delivery at different times and f. o. b. various places, but for the purposes of this claim the issue can be confined to two lots of eggs included in the above contract, to-wit, 110,000 pounds f. o. b. Manning, Iowa, and 90,000 pounds f. o. b. Sleepy Eye, Minnesota, a total of 200,000 pounds. The sale price as specified in the contract for both lots was the same, namely $.93¾ per pound, and the first date for delivery as specified in the offer for both lots was the same, to-wit, May 18, 1942. However, with respect to delivery, FSCC had an option under paragraph 7 of the Announcement of taking delivery on any date within a ten-day period beginning May 18, 1942. As FSCC had the option to choose any particular day within the ten-day period for delivery, it was incumbent upon FSCC to notify the plaintiff of the particular delivery date and the amount to be shipped on such date and the destination of the shipment.

[fol. 5] 6. FSCC did give shipping instructions to the plaintiff for the entire 200,000 pounds of dried eggs. Such shipping instructions were given on FSCC's forms, which were marked Form FSC-1512 and entitled "Notice to Deliver." Under the terms of the contract FSCC could not require the delivery of any of the aforesaid 200,000 pounds of dried eggs previous to May 18, 1942, and moreover under the contract it was required to give shipping instructions with respect to all of said dried eggs before May 29, 1942. Nevertheless, FSCC gave shipping instructions for 54,945 pounds of dried eggs to be shipped from Manning, Iowa, previous to May 18, 1942, to-wit, May 15, 1942, and gave shipping instructions with respect to the remainder of the 200,000 pounds of dried eggs after May 18, 1942, and with respect to a substantial part of the said remainder after

May 28, 1942. The plaintiff shipped and delivered the eggs in all instances exactly in accordance with and at the times specified in FSCC's shipping instructions, and it has not been contended by FSCC or by any other department, bureau or officer of the United States, that the plaintiff failed to deliver any of the 200,000 pounds of eggs, nor that delivery was not in exact accordance with the shipping instructions, nor has it contended that the eggs delivered and reecived by FSCC failed in any respect to meet any of the terms or requirements of the aforesaid contract.

7. The 200,000 pounds of dried whole eggs having been delivered as aforesaid, payment became due under the con- [fol. 6] tract, but the auditor of FSCC, in connection with the issuance of Bureau Voucher No. 2378, issued a notice of suspension dated June 11, 1942, and undertook to assess liquidated damages under paragraph 9 of the Announcement against 117,364 pounds of the dried eggs at $.10 per pound for a total of $11,736.40, and deducted this sum from the payment then due to the plaintiff under the aforesaid contract. Attached to the suspension notice was a memorandum entitled "Memorandum—Bureau Voucher No. 2378," which reads as follows:

> "Contract FSC-22289 under the terms of Announcement FSC-553 provides for the delivery of Dried Whole Eggs for May 18, 1942 delivery as indicated in the offer dated April 22, 1942 and the offer accepted April 23, 1942.
>
> "Announcement FSC-553 paragraph No. 7, 'Delivery'—Dried Egg products accepted for delivery shall be ready for delivery on the date specified in the offer, or if an inspection by Agricultural Marketing Administration had been requested for a date at least ten (10) days prior to the date specified in the offer, and sampling and inspection services were not forthcoming.
>
> "Inspection Certificates covering various lots shipped under Contract FSC-22289 as listed below indicate the eggs were not ready for delivery on the dates specified above. Such late deliveries shall be subject to liquidated damages at ten (10c) per pound."

Following the above language, the memorandum contains in tabular form the following information: That the inspec- [fol. 7] tion certificates for 31,680 pounds of the eggs sold

f. o. b. Sleepy Eye, Minnesota, bore the date May 20, 1942 (which was two days after the first delivery date of May 18th as specified in the offer); that the inspection certificates covering another 31,680 pounds bore the date May 21st (which was three days after May 18th); that the inspection certificates covering 26,529 pounds bore the date May 22nd (which was four days after May 18th); and that the inspection certificates covering 27,475 pounds of the eggs delivered f. o. b. Manning, Iowa, bore the date May 20th (which was two days after May 18th); therefore a total of 117,364 pounds of the eggs delivered under Contract FSC-22289 bore inspection certificates dated subsequent to May 18, 1942.

Subsequent to the filing on July 28, 1943, of the original petition in this cause, the auditor of the Department of Agriculture, in connection with the audit of the plaintiff corporation's voucher No. 487, issued a notice of suspension dated January 5, 1944, and undertook to assess further liquidated damages under paragraph 9 of the Announcement against an additional 27,465 pounds of the dried eggs at $.10 per pound for a total of $2,746.50, and deducted this sum from a payment then due to the plaintiff. This notice of suspension stated that Contract FSC-22289 provided for the delivery of dried whole eggs on May 14, 1942 (a date erroneously used in place of the correct date May 18, 1942); that paragraph 7 of the Announcement indicated that failure to have the specified quantities of dried eggs inspected and ready for delivery on the date specified would [fol. 8] be cause for assessing liquidated damages at $.10 per pound; and that the inspection certificate for 27,465 pounds of the eggs sold f. o. b. Manning, Iowa, bore the date May 20, 1942 (which was two days after the first delivery date of May 18th abovementioned).

Paragraph 7 of the Announcement, upon which the auditors relied to invoke paragraph 9 of the Announcement, contained no provision which required that the particular and specific eggs which were ultimately delivered to FSCC should have been on hand inspected and ready for delivery on May 18, 1942, as the paraphrase of paragraph 7 in the auditors' statements mentioned above would indicate. The requirement with respect to delivery in paragraph 7 reads as follows:

"Save for the exception noted below, failure to have specified quantities of dried egg products in-

spected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of Paragraph 9 below."

This paragraph 7 required, at most, that the plaintiff have on hand on May 18th and upon each of the succeeding ten days such quantity of dried egg products inspected and ready for delivery as FSCC would be entitled to demand upon each of those dates, the purpose and intent of paragraph 7 being that FSCC should not be delayed whenever it was ready to take delivery within the ten-day period specified in the contract. Paragraph 7 did not require that [fol. 9] the plaintiff have on hand the particular lot of dried egg products which were actually delivered to the FSCC upon issuance of its shipping instructions.

The plaintiff avers that it had on hand inspected and ready for delivery on May 18, 1942, and on each and every day thereafter until delivery of the entire 200,000 pounds of eggs had been made, a sufficient quantity of eggs to meet the delivery requirements of the aforesaid contract regardless of when shipping instructions were given, and that the terms of paragraph 7, and of all other provisions of the contract, were by the plaintiff fully observed.

8. Plaintiff further avers that the eggs were delivered in accordance with the FSCC's shipping instructions, that that the FSCC suffered no delay and sustained no damages, and that accordingly, irrespective of the construction to be given to paragraph 7, the action of the FSCC and of the Department of Agriculture in issuing the aforesaid suspensions and in withholding the aforesaid sums was wrongful and in violation of the contract.

9. Plaintiff further avers that if the actions of FSCC and of the Department of Agriculture in suspending and withholding from the plaintiff the above-mentioned sums of $11,736.40 and $2,746.50 were in accordance with the provisions of paragraph 9, then such paragraph 9 is a penalty and not a provision for the assessment of liquidated damages, and is therefore void and unenforceable.

10. Immediately upon receipt of the first of the aforesaid suspension notices, namely, the one dated June 11, 1942,

[fol. 10] plaintiff protested to FSCC against the action taken by it in issuing the suspension notice and in withholding the aforesaid sum of $11,736.40, but no part of the amount withheld was paid to plaintiff, and therefore plaintiff filed reclaim vouchers on, to-wit, November 21, 1942, for the aforesaid $11,736.40 with FSCC in accordance with the following provisions set forth in the aforesaid notice of suspension, to-wit:

> "Suspended items, considered allowable, may be reclaimed on a separate subsequent and similar voucher form. Reclaimed items must be supported by the original suspension notice, full itemization, and brief of evidence."

On January 16, 1943, the plaintiff's reclaim for the suspended amount of $11,736.40 was denied by FSCC.

11. Plaintiff avers that it has in every respect fully and completely performed the contract which it entered into with FSCC; and that FSCC and the Department of Agriculture have paid the full purchase price therefor except for the amount of $14,482.90 (the total of the two amounts, $11,736.40 and $2,746.50, previously described) which they have wrongfully withheld from plaintiff, and that the plaintiff is entitled to recover said sum, together with interest.

12. Plaintiff further avers that it is the sole owner of the above claim; that no assignment or transfer of the [fol. 11] same or any part thereof has been made; that plaintiff is justly entitled to the amount claimed from the United States after allowing all just credits and offsets; that plaintiff is a citizen of the United States and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against the Government of the United States, and that it believes the facts as stated in this petition to be true.

Wherefore, plaintiff prays judgment for such sum of money as may be justly due and owing it amounting to, to-wit, $14,482.90, and interest thereon as follows: on $11,736.40 thereof from, to-wit, June 11, 1942; and on $2,746.50 thereof from, to-wit, January 5, 1944. The plain-

tiff also prays for such further and other relief to which it may appear to be entitled.

Campbell, Clark & Miller, 38 North LaSalle Street, Chicago, Illinois, Counsel for Plaintiff.

Of Counsel: Morris, KixMiller & Baar, Washington, D. C.; J. Arthur Miller, Chicago, Illinois; Allen H. Gardner, Washington, D. C.

[fol. 12] *Duly sworn to by Allen H. Gardner. Jurat omitted in printing.*

[fol. 13] EXHIBIT A TO AMENDED PETITION

United States Department of Agriculture
Agricultural Marketing Administration
Washington, D. C.

April 14, 1942.

Announcement FSC-553
Purchase of Dried Egg Products
(Supersedes Announcement FSC-450)

The Agricultural Marketing Administration announces that it will receive and consider offers for the sale of the following dried egg products, which may for convenience be referred to by their identifying letters:

Product A. Spray dried whole egg.

Product B. Separately packed dried albumen and dried yolk in the proportions of 1 lb. of dried albumen to 2.5 lbs. of dried yolk.

Product C. Dried albumen.

Offers submitted pursuant to this announcement will be accepted by, and after acceptance will become contracts with, the Federal Surplus Commodities Corporation.

How to Submit an Offer

Offers may be submitted by letter or telegram to the Purchase Branch, Agricultural Marketing Administration, United States Department of Agriculture, Washington, D. C., and must state the following:

a. That the offer is made subject to the terms of Announcement FSC-553.

[fol. 14] b. The number of pounds of each dried egg product offered at each delivery point.

c. The beginning date of the delivery period during which the vendor agrees to make delivery. (N.B. Par. 7.—*Delivery.*)

d. Price in cents per pound for each dried egg product, f.o.b. cars, trucks, or warehouses at each delivery point.

e. Name of originating carrier(s) at each delivery point.

In addition, offers for the sale of separately packed dried albumen and dried yolk (Product B) and for dried albumen (Product C) must also state:

f. The method (spray or pan) by which the albumen is processed, and, if a pan process is employed, whether the product is flake, granular, or powdered.

Terms and Conditions

In submitting an offer of sale, the following terms and provisions of this announcement shall become a part of the offer to sell, and upon acceptance by the Federal Surplus Commodities Corporation, hereinafter referred to as FSCC, the offer and acceptance shall constitute a valid and binding contract:

Part 1. *Period of Purchase:* Offers for the sale of dried egg products intended for delivery at any stipulated time through the calendar year 1942 may be submitted so as to be received by the Purchase Branch, AMA, at its Washington, D. C., office not later than 12 noon, EWT, on April 22, 1942, and on each Wednesday thereafter until further notice, but not later than June 30, 1942. Offers received after 12 o'clock noon each Wednesday and before the following Friday will not be considered. Offers received [fol. 15] Friday through Tuesday will be considered with those received on the following Wednesday morning and will be subject to acceptance accordingly, unless previously withdrawn.

Par. 2. *Quantity:* Consideration will be given to offers for any quantity not smaller than a minimum carlot, but offers in multiples of maximum carlots are preferred. For each contract, minus tolerances will be allowed, providing that the gross weight of each shipment is equal to existing

carlot minimums for the originating territory. The permitted tolerances are 1 per cent by weight for dried whole egg (Product A) and dried albumen (Product C), and 2 per cent by weight for separately packed dried albumen and dried yolk (Product B). In the case of separately packed albumen and yolk (Product B) the tolerance shall be calculated separately for each constituent, provided however, that if the actual delivery is in other than the prescribed proportions of 1:2.5, then payment will not be made for that quantity of either constituent delivered in excess of the prescribed proportions. It is desirable that offers and deliveries be computed so as to result in full barrels of each product.

Par. 3. *Quality:* Dried egg products delivered shall be those specified for each lot and shall conform to the following applicable specifications:

All dried egg products shall be prepared either from frozen egg products or from shell eggs. If prepared directly from shell eggs, such shell eggs must be candled before breaking and any unsound or unfit eggs revealed by candling must be discarded. Any remaining unsound or unfit eggs shall be discarded after breaking.

All processes and operations in the preparation of dried egg products must be carried out under strictly sanitary conditions and the failure to comply with this provision, [fol. 16] will result in the rejection of the product tendered for delivery.

Before packaging, dried whole egg and dried yolk delivered under the terms of this announcement shall be sifted, but not forced, through a screen not coarser than #10 U. S. Bureau of Standards sieve. There shall be no grinding before or after sifting.

Chemical analyses used in the examination or testing of samples and deliveries under these specifications shall be performed in accordance with methods of the Association of Official Agricultural Chemists in effect on date of invitation for bids.

All dried egg products shall conform with the provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, and with all subsequent amendments and regulations promulgated before the date of this announcement.

The quality specifications applicable only to particular dried egg products are as follows:

Product A. Dried whole egg—This product shall be clean and free from contamination and from adulterants or preservatives. It shall be produced by the spray process and delivered in powdered form.

Dried whole egg shall have a sweet wholesome egg odor, both in dried form and when reconstituted. It shall be readily and almost completely soluble, and when reconstituted shall produce a smooth homogeneous mixture. It must contain not less than 94 per cent of total solids and not less than 40 per cent of fat as determined by acid hydrolysis. The acidity of the ether extract shall not exceed 3 milliliters of 0.05 normal sodium ethylate per gram of ether extract.

Product B. Separately-packed dried albumen and dried yolk in the proportions of 1 pound of dried albumen to 2.5 pounds of dried yolk—

(1) The albumen delivered under this description must [fol. 17] be clean and free from contamination and from adulterants or preservatives, but it may contain harmless processing materials used in good commercial practice to improve functional qualities.

The albumen delivered under this description shall be in either powdered, flake or granular form as specified in the offer. Deliveries of flake may not contain more than 20 per cent of granular or powdered albumen.

Dried albumen shall have a sweet wholesome albumen odor, both in the dried form and when reconstituted. The color of the product shall be light, and the material must be bright and clear. It shall be readily and substantially soluble. Dried albumen must also retain the whipping qualities of the fresh product in accordance with the following test: one and one-half ounces of dried albumen, when dissolved in 15 ounces of water at 70° F. and beaten in a Hobart electric whipper for 90 seconds in second speed and 90 seconds in third speed, shall produce a foam which when leveled fills the 10 quart bowl of the Hobart whipper to a uniform depth of at least 5½ inches.

Powdered pan dried albumen shall contain not less than 88 per cent total solids, flakes or granular albumen shall contain not less than 84 per cent total solids, and spray dried albumen shall contain not less than 92 per cent total solids.

(2) The dried yolk delivered under this description shall be clean and free from contamination and from adulterants or preservatives. It shall be produced by the spray process.

Dried yolk shall have a sweet wholesome egg yolk odor both in the dried form and when reconstituted. It shall be readily and almost completely soluble, and when reconstituted shall produce a smooth homogeneous mixture. The [fol. 18] product shall contain not less than 95 per cent total solids and not less than 57 per cent fat as measured by acid hydrolysis. The acidity of ether extract shall not exceed 3 milliliters of 0.05 normal sodium ethylate per gram of ether extract.

Product C. Dried albumen—The dried albumen delivered alone shall conform to the same specifications as the dried albumen delivered in combination with dried yolk.

Par. 4. *Inspection and Grading:* (*a*) Inspection of the product intended for delivery shall be performed by the Agricultural Marketing Administration of the United States Department of Agriculture, and it shall be incumbent upon the vendor to arrange with the AMA for inspection services. Inspection and weight certificates shall be issued at the expense of the vendor. Inspection and weight certificates shall be dated not more than 30 calendar days prior to the delivery date specified in the offer. The lots delivered to the FSCC must be the lots sampled and inspected by the AMA, and the grading certificates tendered the FSCC must name the manufacturer of the product, his identifying production lot number for the barrels in question, and the date of manufacture. Dried whole egg (Product A) and the dried yolk offered under the description product B (but not the albumen) manufactured more than 30 days prior to the delivery date specified in the offer will not be acceptable to the FSCC. In addition to the grading certificate, the vendor of Product A must tender with each delivery an affidavit, on form prescribed, attesting to the date of manufacture of the product. (b) At any time when any vendor has an outstanding Contract with FSCC for the delivery of dried egg products, he shall permit authorized representatives of the FSCC, during ordinary business hours, to examine his plant, equipment, processing methods, materials, books and production records to the extent that [fol. 19] is necessary to determine whether the provisions of such contract are being met.

Par. 5. *Packaging:* Dried egg products delivered to the FSCC under the terms of this announcement shall be packed in new standard commercial tongued and grooved barrels

of 150 to 200 pounds capacity, which barrels and necessary liners shall be included in the prices named in the offer. (The specifications for the barrels and liners are attached to this announcement.) All packages shall be so constructed as to insure acceptance by common or other carrier for safe transportation for export shipment at the lowest rates in effect.

Par. 6. *Marking:* Each barrel shall be clearly marked on the side with the following, in letters at least ¾ inch high:

(1) The name and type of dried egg product (In the case of separately-packed dried albumen and dried yolk, barrels containing albumen should be marked appropriately for albumen only, while barrels containing yolk only should be marked correspondingly).

(2) Net weight.

(3) FSC contract number.

(4) The vendor's name and delivery point address.

(5) The manufacturer's name and plant address, if either is different from the vendor's name and address.

(6) The first three letters of the month of manufacture, and the year.

(7) A legend which will be prescribed by the FSCC prior to shipment.

In addition, the barrels shall bear any additional information required for compliance with the Federal Food, Drug [fol. 20] and Cosmetic Act of June 25, 1938.

A sample marking is as follows:

SPRAY DRIED WHOLE EGG or
SPRAY DRIED EGG YOLK ONLY or
SPRAY or PAN DRIED EGG ALBUMEN ONLY,
POWDERED, GRANULAR, or FLAKE
175 LBS. NET
CONTRACT FSC-6940
AMALGAMATED BROKERS, INC.
ACROPOLIS, MICHIGAN
Mfg. by
CONSOLIDATED DEHYDRATORS, INC.
OTAKNAM, MINNESOTA
Jan., 1942
(Legend to be Prescribed)

Par. 7. *Delivery:* The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSSC's option. Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of paragraph 9 below. The only exception against invoking the provisions of paragraph 9 shall be when sampling and inspection by the Agricultural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer, pursuant to item C and the sampling and inspection services were not forthcoming.

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificate issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement. Vendors shall take whatever steps are [fol. 21] necessary to protect fully the dried egg products prior to delivery to the FSCC. Such protection within the prescribed delivery period shall be at the expense of the vendor.

Delivery shall be made at the point (or points) specified in the offer, f.o.b. railroad cars, or, at the option of the FSCC, f.o.b. truck or local warehouse specified by the FSCC.

Par. 8. *Acceptance:* Offers received by 12 noon, EWT, on each offering day shall be subject to acceptance by the FSCC, in whole or in part, by telegram filed on or before the second following day.

Par. 9. *Delays—Damages: Payment:* Inasmuch as the failure of the vendor to deliver the quantity of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty and shall be in the amount set forth below for each pound of dried egg product

undelivered in accordance with the terms of this announcement.

Contract Delivery Date (Date Specified in Offer)	Liquidated Damage Sum
Within and including 50 days of acceptance date	$0.10
51 to 115 days from acceptance date, inclusive	$0.15
116 to 180 days from acceptance date, inclusive	$0.20
181 to 245 days from acceptance date, inclusive	$0.25
246 to 311 days from acceptance date, inclusive	$0.30

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of [fol. 22] probable actual loss because of the difficulty of estimating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for such time as he deems reasonable under the circumstances and in view of the urgent needs of the purchaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable cause beyond the control and without fault or negligence on the part of the vendor, and the determination of the President of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

Payment of vendor's invoices will be made as soon as practicable after submission of a correct claim or claims, and payment will be contingent upon compliance with conditions set forth in this announcement.

Par. 10. *Contract of Sale:* This announcement, together with the offer and acceptance, shall constitute the contract of sale between the vendor and the Federal Surplus Commodities Corporation.

Further details with respect to this program may be obtained by communicating with the Washington office, Telephone: Republic 4142—Extension 2766.

H. C. Albin, Chief, Purchase Branch Agricultural Marketing Administration.

[fol. 23] EXHIBIT B TO AMENDED PETITION

4-22-42 serial prepaid
Mr. H. C. Albin, Chief, Purchase Div.
Dairy-Poultry Branch A.M.A.
U. S. Dept. of Agriculture,
1014 Fifth St. N. W.,
Washington, D. C.

OFFER SUBJECT TERMS ANNOUNCEMENT FCS-450 FOLLOWING TYPE A SPRAY DRIED WHOLE MIXED EGGS: FOR DELIVERY ON OR BEFORE MAY 18, 90,000# at 93¾c per pound fob. Sleepy Eye, Minn. on Northwestern RR., 110,000# at 93¾c fob. Manning, Iowa on Milwaukee, Greatwestern or Northwestern R.R., 69,000# at 94c fob. Des Moines, Iowa on Fort Dodge, Des Moines & Southern RR. FOR DELIVERY FROM DECEMBER 16 to 31, 40,000# at $1.14¾ fob. Sleepy Eye, Minn., on Northwestern RR. FOR DELIVERY FROM JUNE 1 to 15, 20,000# at 95¼c, from June 16 to 31, 20,000# at 96¾c, from July 1 to 15, 20,000# at 98¼c, from July 16 to 31, 23,000# at 99¾c, from August 1 to 15, 23,000# at $1.01¼, from August 16 to 31, 23,000# at $1.02¾, all fob. MANNING, IOWA on MILWAUKEE, GREATWESTERN OR NORTHWESTERN RR.

PRIEBE & SONS INC.

[fol. 24] EXHIBIT C TO AMENDED PETITION

4-22-42 serial prepaid
Mr. H. C. Albin, Chief, Purchase Div.
Dairy-Poultry Branch A.M.A.
U. S. Dept. of Agriculture,
1014 Fifth St. N. W.,
Washington, D. C.

REFERENCE THIS MORNING'S WIRE, OFFERED YOU DRIED EGGS UNDER ANNOUNCEMENT FSC 450 BUT MEANT AND OF COURSE SHOULD HAVE STATED ANNOUNCEMENT FSC 553. PLEASE SO HANDLE. THANKS.

PRIEBE & SONS INC.

[fols. 25-26] EXHIBIT D TO AMENDED PETITION

A WASHINGTON DC 8 19P APR 23 1942

PRIEBE AND SONS INC

CHICAGO ILL

SUBJECT TERMS ANNOUNCEMENT FSC 553 FSCC ACCEPTS YOUR DRIED WHOLE EGG OFFER OF APRIL 22 AS AMENDED APRIL 22 FOR PRODUCT A: 90000 POUNDS AT 93.75 CENTS PER POUND FOR SLEEPYEYE MINNESOTA 110000 POUNDS AT 93.75 CENTS PER POUND MANNING IOWA 60000 AT 94 CENTS DES MOINES IOWA ALL MAY 18 DELIVERY 40000 AT $1.1475 FOR DELIVERY DECEMBER 31 SLEEPYEYE MINNESOTA 23000 AT 95.25 CENTS FOR JUNE 15 DELIVERY 23000 AT 96.75 CENTS FOR JUNE 31 DELIVERY 23000 AT 98.25 CENTS JULY 15 DELIVERY 23000 AT 99.75 CENTS JULY 31 DELIVERY 23000 AT $1.0125 FOR AUGUST 15 DELIVERY 23000 AT $1.0275 FOR AUGUST 31 DELIVERY ALL FOB MANNING IOWA. CONTRACT FSC 22289

H C ALBIN CHIEF PUR BRANCH
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[fols. 27-28] GENERAL TRAVERSE—Filed April 10, 1944

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Francis M. Shea, Assistant Attorney General.

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ARGUMENT AND SUBMISSION OF CASE

On January 8, 1944, the case was argued and submitted on merits by Mr. J. Arthur Miller for plaintiff, and by Mr. S. R. Gamer for defendant.

[fol. 29] V. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J., Dissenting Opinion by Jones, J.**—Filed May 6, 1946

Mr. J. Arthur Miller for plaintiff.

Messrs. Campbell, Clerk & Miller, Morris, KixMiller & Baar, and Mr. Allen H. Gardner were on brief.

Mr. S. R. Gamer with whom was *Mr. Assistant Attorney General John F. Sonnett*, for defendant.

Plaintiff sues to recover $14,482.90 under a contract with defendant on April 23, 1942, which so far as here material, called for 200,000 pounds of dried eggs. The amount claimed by plaintiff represents liquidated damage deducted by defendant, under the provisions of paragraphs 7 and 9 of the contract, from the amount otherwise due.

Plaintiff says, first, that on the facts the liquidated damage should not have been imposed and deducted and, second, that in the circumstances the amount involved was a penalty rather than damage because the defendant did not sustain, and, in the circumstances of this case, could not have sustained any damage by reason of plaintiff's failure to have inspection certificates for the two lots of eggs in question on May 18, 1942, as required by the contract as written, and that on the facts and under the contract terms and conditions there is no basis for withholding the amount deducted.

Special Findings of Fact

1. Plaintiff is and at all times hereinafter mentioned was a Delaware corporation with its principal place of business in Chicago, Illinois.

[fol. 30] 2. During negotiation and performance of the contract hereinafter mentioned the Agricultural Marketing Administration, referred to below as AMA, was an agency of the Department of Agriculture of the United States, and was vested, by consolidation, with the functions and responsibilities of the Federal Surplus Commodities Corporation, hereinafter called FSC, and other Federal agencies. FSC was a nonstock and nonprofit corporation organized under the laws of the State of Delaware and designated by statute as an agency of the United States under the supervision of the Secretary of Agriculture.

3. April 23, 1942, FSC and plaintiff entered into a contract in the following manner:

April 14, 1942, AMA issued an announcement that it would consider offers for the sale of dried egg products, which announcement reads in part:

Announcement FSC-553

Purchase of Dried Egg Products

(Supersedes Announcement FSC—450)

The Agricultural Marketing Administration announces that it will receive and consider offers for the sale of the following dried egg products, which may for convenience be referred to by their identifying letters:

Product A. Spray dried whole egg.

• • • • • • • • •

Offers submitted pursuant to this announcement will be accepted by, and after acceptance will become contracts with, the Federal Surplus Commodities Corporation.

How to Submit an Offer

Offers may be submitted by letter or telegram to the Purchase Branch, Agricultural Marketing Administration, United States Department of Agriculture, Washington, D. C., and must state the following:

a. That the offer is made subject to the terms of Announcement FSC-553.

b. The number of pounds of each dried egg product offered at each delivery point.

[fol. 31] c. The beginning date of the delivery period during which the vendor agrees to make delivery (N. B. Par. 7—Delivery).

d. Price in cents per pound for each dried egg product, f. o. b. cars, trucks, or warehouses at each delivery point.

• • • • • • • •

Terms and Conditions

In submitting an offer of sale, the following terms and provisions of this announcement shall become a part of

the offer to sell, and upon acceptance by the Federal Surplus Commodities Corporation, hereinafter referred to as FSCC, the offer and acceptance shall constitute a valid and binding contract.

* * * * * * * * *

Par. 2. Quantity.—* * * The permitted tolerances are 1 percent by weight for dried whole egg (Product A) * * *

Par. 3. Quality.—Dried egg products delivered shall be those specified for each lot and shall conform to the following applicable specifications:

* * * * * * * * *

Chemical analyses used in the examination or testing of samples and deliveries under these specifications shall be performed in accordance with methods of the Association of Official Agricultural Chemists in effect on date of invitation for bids.

All dried egg products shall conform with the provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, and with all subsequent amendments and regulations promulgated before the date of this announcement.

The quality specifications applicable only to particular dried egg products are as follows:

Product A.—Dried whole egg—This product shall be clean and free from contamination and from adulterants or preservatives. It shall be produced by the spray process and be delivered in powdered form.

Dried whole egg shall have a sweet wholesome egg odor, both in dried form and when reconstituted. It shall be [fol. 32] readily and almost completely soluble, and when reconstituted shall produce a smooth homogeneous mixture. It must contain not less than 94 percent of total solids and not less than 40 percent of fat as determined by acid hydrolysis. The acidity of the ether extract shall not exceed 3 milliliters of 0.05 normal sodium ethylate per gram of ether extract. * * *

Par. 4. Inspection and Grading.—(a) Inspection of the product intended for delivery shall be performed by the Agricultural Marketing Administration of the United States Department of Agriculture, and it shall be incumbent upon the vendor to arrange with the AMA for inspection

services. Inspection and weight certificates shall be issued at the expense of the vendor. Inspection and weight certificates shall be dated not more than 30 calendar days prior to the delivery date specified in the offer. The lots delivered to the FSCC must be the lots sampled and inspected by the AMA, and the grading certificates tendered the FSCC must name the manufacturer of the product, his identifying production lot number for the barrels in question, and the date of manufacture. Dried whole egg (Product A) • • • manufactured more than 30 days prior to the delivery date specified in the offer will not be acceptable to the FSCC. In addition to the grading certificate, the vendor of Product A must tender with each delivery an affidavit, on form prescribed, attesting to the date of manufacture of the product. (b) At any time when any vendor has an outstanding Contract with FSCC for the delivery of dried egg products, he shall permit authorized representatives of the FSCC, during ordinary business hours, to examine his plant, equipment, processing methods, materials, books and production records to the extent that is necessary to determine whether the provisions of such contract are being met.

Par. 5. Packaging.—Dried egg products delivered to the FSCC under the terms of this announcement shall be packed in new standard commercial tongued and grooved barrels of 150 to 200 pounds capacity, which barrels and necessary liners shall be included in the prices named in the offer. [fol. 33] (The specifications for the barrels and liners are attached to this announcement.) All packages shall be so constructed as to insure acceptance by common or other carrier for safe transportation for export shipment at the lowest rates in effect.

Par. 6. Marking.—Each barrel shall be clearly marked on the side with the following, in letters at least ¾ inch high:

(1) The name and type of dried egg product • • •

(2) Net weight.

(3) FSC contract number.

(4) The vendor's name and delivery point address.

(5) The manufacturer's name and plant address, if either is different from the vendor's name and address.

(6) The first three letters of the month of manufacture, and the year.

(7) A legend which will be prescribed by the FSCC prior to shipment.

In addition, the barrels shall bear any additional information required for compliance with the Federal Food, Drug, and Cosmetic Act of June 25, 1938.

. . . . . .

Par. 7. Delivery.—*The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option.* Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of Paragraph 9 below. The only exception against invoking the provisions of Paragraph 9 shall be when sampling and inspection by the Agricultural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer, pursuant to item C and the sampling and inspection services were not forthcoming. [Italics supplied.]

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificate issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement. Vendors shall take whatever steps are [fol. 34] necessary to protect fully the dried egg products prior to delivery to the FSCC. Such protection within the prescribed delivery period shall be at the expense of the vendor.

Delivery shall be made at the point (or points) specified in the offer, f. o. b. railroad cars, or, at the option of the FSCC, f. o. b. truck or local warehouse specified by the FSCC.

. . . . . .

Par. 9. Delays—Damages: Payment.—Inasmuch as the failure of the vendor to deliver the quality of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent

need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below for each pound of dried egg product undelivered in accordance with the terms of this announcement.

Contracted delivery date (date specified in offer):	Liquidated damage sum
Within and including 50 days of Acceptance date	$0.10
51 to 115 days from acceptance date, inclusive	.15
116 to 180 days from acceptance date, inclusive	.20
181 to 245 days from acceptance date, inclusive	.25
246 to 311 days from acceptance date, inclusive	.30

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for such time as he deems reasonable under the circumstances and in view of the urgent needs of the pur- [fol. 35] chaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor, and the determination of the President

of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

Payment of vendor's invoice will be made as soon as practicable after submission of a correct claim or claims, and payment will be contingent upon compliance with conditions set forth in this announcement.

Par. 10. Contract of Sale.—This anouncement, together with the offer and acceptance, shall constitute the contract of sale between the vendor and the Federal Surplus Commodities Corporation.

4. April 22, plaintiff sent a telegram to AMA which, as amended by a second telegram the same day, reads, in part:

> Offer subject terms announcement FSC-553 following type a spray dried whole mixed eggs: for delivery on or before May 18, 90,000# at 93¾¢ per pound fob. Sleepy Eye, Minn. • • • 110,000# at 93¾¢ fob. Manning, Iowa • • •

April 23, AMA sent a telegram to plaintiff which reads in part:

> Subject terms announcement FSC 553, FSCC accepts your dried whole egg offer of April 22 • • • 90,000 pounds at 93.75 cents per pound fob. Sleepy Eye, Minnesota, 110,000 pounds at 93.75 cents per pound Manning, Iowa • • • all May 18 delivery. • • • contract FSC 22289.

April 24, plaintiff sent a telegram to AMA which reads in part:

> Confirm sale under contract FSC-22289 terms announcement FSC-553 following dried whole eggs: May 18 delivery 90,000 lbs at 93.75 cents per pound fob. Sleepy Eye, Minn. 110,000 lbs at 93.75 cents for Manning, Iowa • • •

[fol. 36] 5. The contract included agreements to deliver dried eggs on various dates and at various shipping points other than those involved in this action. This action involves only deliveries made under that portion of the agreement by which plaintiff promised to deliver 200,000 pounds f. o. b. Manning, Iowa, and Sleepy Eye, Minnesota, within

a ten-day period commencing May 18, the precise date to be selected by the FSC.

6. In preparation for filling the orders plaintiff manufactured the product and, following the general procedure adopted for these and other deliveries, made written application to AMA upon a form provided by AMA, for the sampling, weighing, analyzing, and grading of the dried eggs. In response an AMA representative would visit the particular plant, check the barrels in which the powder was contained, make certain the barrels were marked as required by the contract, check the date of manufacture, and make test weights. He would take samples of the powder and forward them to the AMA laboratory at Chicago, Illinois, with a report of his findings. The AMA laboratory would then analyze and grade the powder and would issue a certificate which would include the results of the sampler's investigation as well as the results of the laboratory analyses. Such certificate would identify the powder by reference to lot numbers and, except in rare instances, the number of the contract to which the powder was applied. As soon as the laboratory analyses had been completed and before the certificate was typed, a telegram was sent to plaintiff advising whether the product had passed inspection, which telegram would give the number of the certificate. The certificate would be dated as of the date of completion of the analyses. The analyses ordinarily took one to three days after the arrival of the samples at the laboratory and one to several days were required for the samples to reach the laboratory after the sampling at the plant, depending upon current conditions. None of the powder here involved was delivered to the railroad prior to the time the analyses were completed and the certificates issued.

7. The 200,000 pounds of the powder contracted for as above set forth, constituted a number of carloads. The pro- [fol. 37] cedure followed by the parties in the ordering out and shipping of the several carloads was substantially as follows:

AMA from Washington would send to plaintiff at Chicago a written notice to deliver, specifying the quantity, the place from which the powder was to be shipped, the destination, and the particular time within the ten-day period provided by the contract at which delivery must be made. A Govern-

ment bill of lading was enclosed for each carload ordered to be shipped.

Upon receipt of the notice at Chicago, plaintiff would send it promptly to the plant at the designated place of delivery together with the Government bill of lading and, at the plant, plaintiff would promptly deliver the powder to the railroad. In the case of the shipments here involved, the original AMA grading and weighing certificate was not sent to plaintiff but was retained by the AMA and, through intradepartmental communication, was attached to plaintiff's vouchers for payment after they had been presented to FSC.

8. The first notice to deliver dried eggs under the 200,000-pound portion of the contract here involved was for 54,945 pounds. This notice dated May 15, three days prior to the beginning of the ten-day period specified in the contract, directed shipment "immediately." The powder was shipped May 17 and 18 and was duly paid for by defendant. These shipments are not material to this suit, except that they complete the total of 200,000 pounds contracted for delivery within the ten days commencing May 18.

9. By notice dated May 26, within the ten-day period specified in the contract, FSC directed plaintiff to ship "immediately" 54,930 pounds of powder from Manning, Iowa. The powder, shipped in two cars, had been manufactured May 11-14, inclusive, was sampled May 14 and 15, and the AMA grading and weight certificate was issued May 20. The powder was delivered to the railroad May 26.

By notice dated May 29, the second day after the end of the ten-day period provided by the contract, FSC requested plaintiff to ship "immediately" 22,500 pounds of powder from Sleepy Eye, Minnesota. The powder, shipped in one car, had been manufactured May 9-12, inclusive, had been [fol. 38] sampled May 13, and the AMA certificate was issued May 21. The powder was delivered at the railroad June 2.

By notice dated June 4, the eighth day after the end of the ten-day period provided by the contract, following telegraphic appeal from plaintiff asking for shipping instructions because the powder was taxing storage facilities at the plant, FSC requested plaintiff to ship "immediately" 67,500 pounds of powder from Sleepy Eye, Minnesota. The powder, shipped in three cars, had been manufactured May 12-16, inclusive, had been sampled May 15 and 18, and the

AMA certificates were issued May 20 and 22. The powder was delivered at the railroad June 5.

All of said dried egg powder was found upon AMA inspection to meet the requirements of the contract, and the inspection certificates set forth the facts which so indicated. Said powder was accepted by FSC without complaint or objection, except as indicated hereinafter.

The total number of pounds ordered by FSC out of the 200,000-pound portion was within the tolerance of 1% weight permitted by paragraph 2 of the announcement, and no question is raised in that connection.

10. For convenient reference, the shipments here involved are tabulated as follows:

Date of notice to deliver	Date of manufacture	Date of sampling	Date of AMA certificate	Date shipped
May 26; 54,930#	(a) May 11, 12, 13	May 14	May 20	May 26; 27,465#
	(b) May 12, 13, 14	May 15	May 20	May 26; 27,475#
May 29; 22,500#	(c) May 9, 11, 12	May 13	May 21	June 2; 22,440#
June 4; 67,500#	(d) May 12, 13, 14	May 15	May 20	June 5; 21,120#
	(e) May 14, 15, 16	May 18	May 22	June 5; 23,724#
	(f) May 14, 15, 16	May 18	May 22	June 5; 22,605#
				Total: 144,829#

11. As each car was shipped, plaintiff billed defendant on the public voucher form prescribed therefor and after all the shipments here involved had been made and accepted by the FSC, defendant notified plaintiff that it was withholding from payments due plaintiff on account of other transactions, about which there is no dispute between the parties, the sum of $11,736.40. This sum represented an assessment of liquidated damages of 10 cents per pound on the shipments marked "b" to "f" inclusive in the table in finding 10.

[fol. 39] Attached to the notice was a memorandum of explanation which reads in part as follows:

> Contract FSC-22289 under the terms of Announcement FSC-553 provides for the delivery of Dried Whole Eggs for May 18, 1942, delivery as indicated in the offer dated April 22, 1942, and the offer accepted April 23, 1942.
>
> Announcement FSC-553 paragraph No. 7, "Delivery"—Dried Egg products accepted for delivery shall

be ready for delivery on the date specified in the offer, or if an inspection by Agricultural Marketing Administration had been requested for a date at least ten (10) days prior to the date specified in the offer, and sampling and inspection services were not forthcoming.

Inspection Certificates covering various lots shipped under Contract FSC-22289 as listed below indicate the eggs were not ready for delivery on the dates specified above. Such late deliveries shall be subject to liquidated damages at ten (10¢) per pound.

[here in tabular form are listed the shipments, showing that the dates of the inspection certificates were 1, 2 and 3 days subsequent to May 18, the date of "delivery as indicated in the offer."]

Total Number of Pounds	117,364
117,364 Pounds at $0.10 per pound	$11,736.40

12. June 13, 1942, pursuant to provisions in paragraph 9 of the announcement, plaintiff, in writing, appealed such assessment to the president of FSC.

September 9, 1942, the president of FSC denied said appeal in the following communication which was sent to plaintiff:

Following our conversation the other day, I have had the matter of the assessment of liquidated damages under Contract FSC-22289 (Bureau Voucher No. 2378) reviewed.

The contract is specific with respect to the matter of delivery dates, and there appears to be no evidence before us showing that the delay was due to unforeseeable causes beyond your control and without fault or negligence on your part. It may be that there are facts and [fol. 40] circumstances which would justify further action, but if so your case has not been adequately presented.

Certainly I have no desire to assess a penalty unnecessarily. Likewise I cannot be placed in the position of authorizing payment of a larger amount than is necessary under a government contract without clear justification. Any such action is subject to review by the General Accounting Office, and on the basis of this record I am satisfied an exception in your case would be disallowed. There have been a number of other con-

tracts where liquidated damages have been assessed. Auditors can certify payment only on the basis of the actual terms of the contract. If you feel that your case has been submitted fully, we are unable to make an exception. If there are any further facts or circumstances you wish to call to our attention we will be glad to have them.

Before making this decision the president referred the matter to a committee for consideration and advice. The committee unanimously recomended to the president that the assessment not be remitted.

Subsequently, plaintiff again appealed to the president of FSC and submitted a legal brief in support of its appeal. January 16, 1943, this second appeal was denied by letter to plaintiff. Said letter stated that plaintiff's legal brief had been submitted to the "Solicitor of the Department for review and opinion. You are advised that this office is now in receipt of a Memorandum from the Solicitor stating that the liquidated damages were properly assessed by our Audit Division and that the recent contention of your attorneys cannot be accepted as grounds for relief from the operation of the Contract."

13. January 5, 1944, several months after plaintiff's petition in this suit had been filed, defendant notified plaintiff that it was withholding from payments due plaintiff on account of other transactions, about which there is no dispute between parties, the further sum of $2,746.50.

The notice called attention to the above contract and further stated:

> [fol. 41] Paragraph 7 of the above Announcement indicated that failure by the vendor to have specified quantities of the dried egg product inspected and ready for delivery by the date specified in the offer will be cause for assessing liquidated damages in accordance with the terms of Paragraph 9. F. O. B. Manning, Iowa.

The tabulation attached to the notice shows that the certificate covering the powder contained in the shipment marked "a" in the table in finding 10 was dated May 20, two days after May 18, "the date specified in the offer."

14. There was no delay on the part of plaintiff, after notice to deliver, in making prompt delivery to the railroad

cars at the points specified in the notices and it is not contended that FSC, AMA, or other agency or facility, or the ultimate consumers were delayed or otherwise inconvenienced by the fact that the inspection certificates were not available on May 18. The assessment of liquidated damages was based upon the fact that the inspection certificates were dated May 20, 21, and 22, respectively, instead of on or before May 18, the beginning day of the ten-day period within which defendant had option to order delivery, and upon the theory that, in consequence, the powder was "undelivered in accordance with the terms of this announcement" (announcement, paragraph 9), because of plaintiff's "failure to have the specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer" (announcement, paragraph 7).

15. Plaintiff had on hand on May 18 at Manning, Iowa, 47,416 pounds of powder which prior to that time had been inspected and AMA certificates issued thereon. F. M. Stamper & Co., a corporation, having interlocking stockholders, directors, and officers with the plaintiff, had on hand on May 18 at Moberly and St. Louis, Missouri, 139,625 pounds of powder which prior to that time had been inspected and AMA certificates issued thereon. L. D. Schreiber and Co., Inc., a corporation, had on hand on May 18 at Manning, Iowa, 15,750 pounds of powder which had been inspected and AMA certificates issued thereon prior to May 18. Between themselves, plaintiff and Schreiber had per-
[fol. 42] formed that portion of the contract which was to be performed at Manning, Iowa, as a joint venture. The powder belonging to the Stamper Company and the Schreiber Company could have been obtained by plaintiff on May 18 and on each of the ten days immediately following, but only with defendant's consent.

[illegible] of said 187,041 pounds of powder had been inspected to fulfill the terms of other contracts which plaintiff and said other companies had entered into with FSC, and all of said AMA certificates which had been issued thereon bore contract numbers different from the contract involved in this case. Switching inspected powder from one contract to another was not permitted without defendant's consent and would have to be evidenced by the issuance of an amendment to the certificate which bore the number of the contract to which the powder was applied. Said powder of the

Schreiber Company was on May 18 being held by that company against a May 16 delivery date contract. Said powder which plaintiff had on hand on May 18 was held by it against a May 11 delivery date contract.

16. The circumstances connected with the making of the contract were: Shortly after the Lend-Lease Act of March 11, 1941, was enacted, the defendant embarked on a program of purchasing dried eggs, principally for shipment to England, to alleviate the food shortage in that country. The Department of Agriculture in cooperation with the industry made extensive plans for production and purchase by the defendant of greatly increasing amounts. Commencing in April 1941, and at various times thereafter, the defendant through the FSC published announcements, invited offers, and made contracts for the purchase of egg products similar to the contract hereinbefore described. The FSC had its operation scheduled on a monthly basis to meet commitments to England and Russia under the Lend-Lease Act. The program was affected by the shipping situation and had to be correlated with it. Shipping space was at a premium and it was imperative that no vessel depart with unfilled space because of the failure of a producer to have his product ready by the time specified in his offer. The urgency related to time and not to considerations of cost. As a result, commencing February 25, 1942, [fol. 43] a provision for liquidated damages was included in the announcements. The graded scale of damages was an estimate based upon the experience of defendant with egg market trends, the announcement being issued in the spring when the price of fresh eggs was low and the increases in the scale of liquidated damages corresponding with estimated increases in the market prices of eggs during equivalent periods. The underlying and important reason for the provision, however, was to assure the receipt of the product at the times specified in the contracts. The clause was inserted to encourage the producers of the dried egg products to have the products available on the dates for which contracted.

17. The reason for the provision in par. 7 of the contract permitting FSC to take delivery during a 10-day period after the date specified in the offer is as follows: As hereinbefore stated, the program had to be correlated with the shipping situation. Much of the powder was shipped di-

rectly to vessels. However, incoming vessels were often delayed in arriving. Also, the powder would sometimes be shipped to a packing plant for packaging in containers suitable for consumer use. At times such plants would be operating at capacity and could not absorb any more powder. In addition, powder would sometimes be shipped to cold storage warehouses as an incident to the packaging program or to await incoming convoys. At times, however, such warehouses would be filled to capacity. The purpose of allowing FSC 10 days after the contract delivery date to accept delivery was to give FSC some leeway in its program to meet such contingencies. It was due to all the above factors, especially the situation with respect to the packaging plants, that caused FSC to delay calling for delivery of some of the powder herein involved until May 29, 1942 and June 4, 1942. All of the 200,00 pounds of powder herein involved was ordered shipped to packaging plants and cold storage companies, although other powder under the same contract was ordered shipped directly to the British Ministry of War Transport. When FSC failed to order shipment during said 10-day contract option period, thereby causing the producer to store the powder beyond such period, FSC would entertain a claim by the producer to reimburse him for such extra costs as may have been incurred by the producer for such excess storage. Plain-[fol. 44] tiff has never made any such claims with respect to any of the powder involved in this suit.

Plaintiff commenced its dried egg business almost as soon as the Government program began in 1941, and did a very large amount of such business with FSC, both under the instant announcement and previous ones. It was fully familiar with the program, the details of the Government operation, and the relationship of the program to the war effort.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

The only question presented in this case is whether plaintiff is entitled to recover $14,482.90 liquidated damage deducted by defendant under the express terms of a contract by reason of the failure of plaintiff to have certain quantities, totalling 114,829 pounds, of dried eggs manufactured, inspected, tested, accepted and ready for delivery or shipment in part at Manning, Iowa, and in part at Sleepy Eye, Minn., on the contract date of May 18, 1942. Six certain lots of the eggs at these two points were not ready for delivery until May 20, 21, and 22, respectively, and the stipulated liquidated damage of 10 cents a pound was accordingly charged and deducted from amounts otherwise due plaintiff. This contract called for 200,000 pounds but the balance of 45,945 pounds is not here in question.

In 1941 the Government through the Agricultural Marketing Administration (herein referred to as AMA) and the Federal Surplus Commodities Corporation (herein referred to as FCC), agencies of the Department of Agriculture, entered upon a program of purchasing, through contracts, dried or powdered eggs. Plaintiff commenced [fol. 45] its dried egg business almost at the inception of this program and did a very large amount of such business under such contracts with FCC before and after April 23, 1942, the date of the contract for dried eggs involved in this case. Plaintiff was familiar with the program, the details of the Government operations in connection therewith, and the relationship of the program to the war effort.

The contract in suit was entitled "Announcement FSC-553, Purchase of Dried Egg Products."

The detailed facts, about which there is no dispute, concerning the making on April 23, 1942, of the written contract in suit and the terms and conditions thereof are set forth in findings 3-5. Plaintiff fixed the delivery date of May 18, 1942, for the 200,000 pounds of dried eggs (herein sometimes called powder) called for by the contract under par. 1 (c) thereof, which required that the seller state "The beginning date of the delivery period during which the vendor agrees to make delivery (N. B. Par. 7—Delivery)." Paragraphs 3 and 4 related to inspection and grading and

the chemical analysis to be used in the examination and testing of samples (finding 3). Paragraph 4 required that inspection of the powder must be by the AMA and made it incumbent on plaintiff to arrange for such service. In addition it was provided that "Inspection and weight certificates shall be issued at the expense of the vendor. Inspection and weight certificates shall be dated not more than 30 calendar days prior to the delivery date specified in the offer. The lots delivered to the FSCC must be the lots sampled and inspected by the AMA, and the grading certificates tendered the FSCC must name the manufacturer of the product, his identifying production lot number for the barrels in question, and the date of manufacture." Inspection certificates were issued and dated on the day defendant completed the analysis of samples at its Chicago Laboratory and plaintiff was immediately notified by wire whether the samples had or had not met the required test and was given the number of each certificate for each lot so inspected. There was no delay in inspecting, weighing, taking samples of each lot and analyzing them. The AMA inspector weighed and took samples of each of the six lots here involved on the first or second day after completion of manufacture and these samples were tested and analyzed [fol. 46] as promptly as was possible. The final inspection certificates for the powder here involved were issued from 4 to 7 days after the date on which samples of each lot were taken. Plaintiff does not claim that inspection certificates should or could have been issued earlier.

Paragraphs 7 and 9 of the contract provided, so far as here material, as follows:

> Par. 7. *Delivery:* The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option. Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of paragraph 9 below. The only exception against invoking the provisions of paragraph 9 shall be when sampling and inspection by the Agricultural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer,

pursuant to item C and the sampling and inspection services were not forthcoming.

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificates issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement.

* * * * * * *

Par. 9. *Delays—Damages: Payment:* Inasmuch as the failure of the vendor to deliver the quantity of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below [fol. 47] for each pound of dried egg product undelivered in accordance with the terms of this announcement.

Contracted delivery date (date specified in offer):	*Liquidated damage sum*
Within and including 50 days of acceptance date	$0.10

* * * * * * *

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for

such time as he deems reasonable under the circumstances and in view of the urgent needs of the purchaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor, and the determination of the President of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

The liquidated damage of $14,482.90 at the agreed rate of 10 cents a pound was imposed and deducted from the contract price in making payments to plaintiff for the 114,482 pounds of powder in question. Plaintiff appealed to the President of FCC for remission of the liquidated damage and its appeal was considered and denied, as was also a petition and brief for reconsideration.

Plaintiff admits that it was at fault in not having the powder ready for delivery on May 18, but argues that paragraphs 1, 7, and 9 of the contract, which had to do with liquidated damage, did not intend that the stipulated liqui- [fol. 48] dated damage should be exacted where there had "been no possibility of actual damage" due to failure to have the eggs inspected and ready for delivery on or before May 18; that there was no such possibility of damage in this case because the inspection certificates were issued on May 20, 21, and 22, 1942, respectively, and defendant did not give notice of call for delivery of the eggs f. o. b. Manning, Iowa, and Sleepy Eye, Minn., until May 26, 29, and June 4, respectively; and that if it should be held that the contract intended to make the liquidated damage due if the eggs were not ready for delivery on May 18 because it was contemplated by the contract that the FCC might have given notice to deliver on that date, "plaintiff could have shipped other dried eggs certified before that date." We think none of these contentions can be sustained under the terms of the contract and the evidence of record. The language of paragraphs 1, 3, 4, 7, and 9 relating to the delivery date, inspection certificates and liquidated damage is very plain and unambiguous, and there is no room for construction.

Plaintiff, however, seeks to find an ambiguity by referring to the 10-day period allowed FCC to call for shipment of the powder and says it must have been intended by that provision that the 10-cents-a-pound damage would accrue if the powder was not inspected and ready when called for. Paragraph 7 appears to have been designed and intended to avoid just such a claim by expressly providing that the delivery date intended by the contract "shall be the first day of a 10-day period"; that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date [May 18] specified in the offer will be cause for invoking the provisions of paragraph 9," which provided for the payment of liquidated damage of 10 cents a pound for a delay up to 50 days in the event of failure of plaintiff to have the eggs ready for delivery in accordance with the terms of the contract. Moreover, paragraph 7 provided that the only exception against exaction of the liquidated damage under paragraph 9 "shall be when sampling and inspection * * * had been requested for a date at least 10 days prior" to May 18, "and the sampling [fol. 49] and inspection services were not forthcoming." The phrase "undelivered in accordance with the terms of this announcement [contract]" appearing in paragraph 9 must be read in the light of paragraph 7 and, when so read, it is clear that the phrase meant the delivery date of May 18. The provisions as to the delivery date and liquidated damage were clearly directed to the matter of having the eggs manufactured, inspected, and ready for delivery on or before May 18, to the end that defendant might carry on its dried-egg program with assurance that it could count on the dried-egg products being ready on the specified date. Plaintiff was thoroughly familiar with the reasons which made this requirement necessary. It is also clear from paragraph 7 that the option given defendant to call for shipment within 10 days after the delivery date of May 18 had no connection with the matter of payment of the stipulated liquidated damage; that option was given, as plaintiff knew, in order to provide defendant with a leeway of 10 days in connection with available storage, packaging and shipping facilities (finding 16).

With reference to plaintiff's contention that it could have delivered and shipped to the FCC other dried eggs which had been inspected and certified prior to May 18, it appears,

as set forth in detail in finding 15, that the other eggs referred to did not belong to plaintiff but had been processed by F. M. Stamper & Co., at Moberly and St. Louis, Mo., and L. D. Schreiber & Co., Inc., at Manning, Iowa, under other contracts with FCC to which contracts such eggs were obligated by the inspection certificates issued thereon and for the fulfillment of which contracts the eggs were being held subject to notice of call. While it may be true that plaintiff was on such terms with those companies that it could have obtained their consent to the transfer of those inspected eggs to apply on plaintiff's May 18 contract, it did not attempt to do so and it could not have done so without defendant's consent and approval. Whether defendant would have approved such transfer does not appear. Such a transfer might have left Stamper & Co., and Schreiber & Co., subject to liquidated damage on their contracts. Since those eggs and inspection certificates were committed to other con-
[fol. 50] tracts the eggs were not available for delivery by plaintiff on May 18 under the contract in suit within the meaning of paragraphs 1 (c) and 7 thereof.

Finally, plaintiff argues that in view of the circumstances the amount collected as liquidated damage was in reality a penalty which the court should refuse to enforce. We find no merit in this contention in view of the facts and circumstances disclosed by the evidence and the express agreement of the parties that the agreed liquidated damage of 10-cents a pound was not a penalty. We can find nothing in the contract or in the evidence which would justify the conclusion that the contract intended that the sum agreed to be paid would be liquidated damages if the eggs were called for on May 18 and were not then inspected and ready and would be a penalty if such eggs were not inspected and ready on that date but not called for prior to issuance of the required inspection certificate. On the contrary the circumstances and the language used by the parties negative such an interpretation of the contract. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 118-122.

Plaintiff is not entitled to recover, and the petition is, therefore, dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice,* concur.
JONES, *Judge,* dissenting:

There was no delay in the actual delivery of the eggs. It is admitted that plaintiff made prompt delivery of all shipments as requested. There being no delay in the delivery of the product there was no occasion to assess liquidated damages.

Had the Government desired earlier shipment, within the date specified, and had the plaintiff been unable to promptly comply due to any failure to have the eggs, dried, inspected, and ready for shipment, it would have been entirely proper to assess liquidated damages, since the actual damages would have been difficult to establish. No such state of facts is presented here. All deliveries were made without any delay whatever.

Both plaintiff and defendant were operating under great difficulties. Wartime shortages are frequently cruel to both [fol. 51] the producer of the article and the nation that has overwhelming need of the supply. I appreciate the fact that if was necessary for the Government to have a strong protective provision in order to assure that every effort would be made to have the essential supplies ready when needed. But the very strength of the provision calls for a fair interpretation and a just application.

A careful reading of the provisions of the contract takes away all basis of the Government's claim to make a deduction. Paragraph 7 says that "Failure to have specified quantities of eggs inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of paragraph 9."

Paragraph 9 provides that "Failure to *deliver* the quantity specified in the contract in accordance with the terms of the announcement" shall be ground for assessing liquidated damages [italics supplied]. Concededly there was neither failure of nor delay in delivery. The facts do not meet the specifications required as a condition to the assessing of liquidated damages. The fact that the Government could have asked for earlier delivery but didn't is not sufficient grounds for penalizing the plaintiff. The case of *United States* v. *Bethlehem Steel Co.,* cited in the court's opinion, is inapplicable since in that case there was delay in delivery.

To construe the contract in such a way as to require plaintiff to have the goods ready for delivery even though the defendant was not ready to accept them, and at the same time permit the defendant to delay taking them or to refuse to take them altogether, putting plaintiff to the expense of storage and possibly loss through spoilage with no obligation on the part of the Government to accept them, would be an extreme interpretation.

Failure to comply with paragraph 7 simply brings paragraph 9 into play. Paragraph 9 governs the assessing of liquidated damages. Its terms limit defendant's right to assess damages to "Failure to deliver" and not to mere failure to have been ready for delivery at a previous time. This seems perfectly clear to me.

[fol. 52] There were no damages. There could have been none until the Government was ready to accept shipment. In the circumstances of this case liquidated damages should not be assessed.

MADDEN, Judge, took no part in the decision of this case.

[fols. 53-54] JUDGMENT OF THE COURT—May 6, 1946

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore adjudged and ordered that the plaintiff's petition be and the same is hereby dismissed.

[fols. 55-56] PROCEEDINGS AFTER ENTRY OF JUDGMENT

On July 3, 1946, the plaintiff filed a motion for a new trial.

On October 7, 1946, the court entered the following order on said motion:

Order

It is ordered this 7th day of October, 1946, that the plaintiff's motion for new trial be *in* the same is overruled.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 861

ORDER ALLOWING CERTIORARI—Filed March 10, 1947

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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OTHER AUTHORITIES CITED

Restatement, Contracts, Sec. 339, p. 552 ..... 4, 14, 15
Williston, Contracts (Rev. ed.), Secs. 776-784 ..... 4, 14, 15
Williston, Sales (2d ed.), Sec. 457 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 861

PRIEBE & SONS, INC.,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

PETITION

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered on May 6, 1946 (R. 40), and the Court's order entered on October 7, 1946 (R. 40), denying the petitioner's motion for a new trial.

Statement

The facts, found with substantial accuracy by the Court of Claims (R. 18-32), are briefly these:

The petitioner corporation and the Federal Surplus Commodities Corporation, a United States agency hereinafter

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 861 16

PRIEBE & SONS, INC.,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

SAMUEL WILLISTON,
Counsel for Petitioner.

J. ARTHUR MILLER,
ALLEN H. GARDNER,
Of Counsel.

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called FSCC, entered into a contract on April 23, 1942, for the sale to FSCC of dried eggs (R. 18, 19).

The contract provided that the petitioner would make, and the FSCC would accept, delivery at some time within a 10-day period beginning May 18, 1942, but that the particular day was at FSCC's option (R. 19, 22, 24, 25).

The FSCC by various notices directed petitioner to make immediate shipment of specified quantities of dried eggs (R. 26, 27). These notices were promptly followed by delivery of the eggs (R. 26, 27, 29-30). FSCC accepted the product and has never questioned its quantity or quality, nor the time or place of delivery (R. 27).

Subsequently, the FSCC imposed damages of $14,482.90 on the petitioner (R. 27-30). The FSCC notified the petitioner that the damages had been imposed under a contract provision calling for liquidated damages at 10 cents a pound on such quantities of dried eggs as were not ready for delivery on May 18, 1942, and that inspection certificates indicated that 144,829 pounds were not ready on that day (R. 27-30).

Paragraph 7 of the contract provided that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified [May 18, 1942] • • • will be cause for invoking the provisions of Paragraph 9" (R. 22). Paragraph 9 provided that, since "the failure of the vendor to deliver the quantity of the commodity • • • specified • • • in accordance with the terms • • • will • • • cause serious and substantial damages to the purchaser," and since it would be difficult to prove the amount of the damages, the vendor agreed to pay the FSCC liquidated damages (R. 22-23). The damages were to be computed at a specified number of cents "for

each pound of dried egg product undelivered in accordance with the terms" of the contract (R. 23). The damages were to be 10 cents a pound when the specified first day of the 10-day delivery period (May 18, 1942) was no more than 50 days after the contract date (April 23, 1942), and were to increase by a graduated scale up to 30 cents a pound if the specified first day was from 246 to 311 days after the contract date (R. 23).

The contract provided that the vendor should arrange with an agency of the United States for inspection of the product, and should tender a grading certificate with each delivery (R. 20-22). The barrels used in shipping were to be marked with certain information concerning the product, the vendor, and the manufacturer, including a legend furnished by the FSCC (R. 21, 22).

The product on which the damages were imposed had all been manufactured before May 18, 1942, but the grading certificates which showed that the product was acceptable bore dates between May 20 and 22, 1942 (R. 26-27). The fact that these certificates were dated subsequent to May 18, 1942, was the basis for the imposition of damages (R. 30). The first notice to ship any of the eggs on which damages were imposed was dated May 26, 1942 (R. 26). The other notices to ship were dated May 29 and June 4, 1942 (R. 26, 27).

The petitioner sued in the Court of Claims to recover the damages with interest (R. 1, 7), but that Court held that the imposition of damages was proper (R. 32).

Question Presented

Whether the provision of paragraph 7 of the contract under which damages were imposed was an invalid pro-

vision for a penalty or an enforceable provision for liquidated damages.

Reason for Granting the Writ

The decision below is in flat, open conflict with a principle repeatedly enunciated in decisions of this Court and other authorities. This is the principle—one of the fundamental and universally applied rules of the law of contracts—that an agreement fixing damages for a future breach at an amount which is not a reasonable forecast of just compensation for the injury anticipated from the breach will be held unenforceable as a penalty. *Kothe* v. *Taylor Trust*, 280 U. S. 224, 226; *Irving Trust Co.* v. *Perry*, 293 U. S. 307, 311; *Wise* v. *United States*, 249 U. S. 361, 365-367; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 121; *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642, 672-674; Restatement, Contracts, § 339, p. 552; Williston, Contracts (Rev. ed.), §§ 776-784.

In this case, paragraph 9 (R. 22, 23) provided for liquidated damages upon failure to make timely delivery whether such failure arose because the certificates were not ready when delivery was called for or for any other reason. Paragraph 7 (R. 22), as construed [1] by the Court of Claims (R. 36, 37), covered no situation not provided for by paragraph 9 except the case of a vendor who did not have eggs certificated and otherwise ready on May 18, 1942, but who delivered certificated eggs promptly on request by the FSAC. Therefore, the additional imposition specified under this construction of paragraph 7, applying as it did only to a situation where there could not possibly be any injury to

[1] See footnote 2, p. 9, with reference to the construction by the Court of Claims.

the United States, was not a pre-estimate of compensation for injury.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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Cambridge, Massachusetts,
Counsel for Petitioner.

Of Counsel:
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ALLEN H. GARDNER,
Washington, D. C.

January, 1947.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The majority and minority opinions of the Court of Claims (R. 33-40) are reported in — C. Cls. ——, 65 Fed. Supp. 457.

Jurisdiction

The judgment of the Court of Claims was entered May 6, 1946 (R. 40), and its order denying the petitioner's motion for a new trial was entered October 7, 1946 (R. 40). Jurisdiction is conferred on this Court by section 3(b) of the Act of February 13, 1925, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, 53 Stat. 752.

Statement

The essential facts are stated in the preceding petition, pp. 1-3.

Question Presented

The question presented is stated in the foregoing petition, pp. 3, 4.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that the provision in question was an enforceable provision for liquidated damages rather than an invalid penalty clause.

2. In failing to hold that the amount fixed as damages for mere omission to have the certificates ready May 18, 1942, was not a reasonable forecast of just compensation for such a technical breach, and that accordingly the provision was unenforceable.

3. In failing to hold that the amount fixed as damages for mere omission to have the certificates ready May 18, 1942, was intended to be held *in terrorem* over the petitioner, and to force performance through the excessiveness of the amount, rather than to be a good faith pre-estimate of anticipated damages, and in failing to hold, as a consequence, that the provision was a penalty clause.

4. In attaching conclusive weight to the use of the contract term "liquidated damages" in holding that the provision was enforceable.

5. In failing to hold that the provision fixing the same damages for trivial as for serious breaches rendered it invalid as a penalty.

6. In dismissing the petition.

7. In denying the motion for a new trial.

Summary of Argument

The petitioner contracted to sell dried eggs to a Government agency. The petitioner made timely delivery of eggs of the proper quantity and quality, together with the required certificates, and the Government never raised any question as to such delivery. However, the Government imposed damages under its interpretation of paragraph 7 of the contract because of the technical omission to have the certificates ready by May 18, 1942. The petitioner sued in the Court below to recover the damages paid, but the Court gave judgment for the respondent.

The contract, in paragraph 9, imposed heavy damages for failure to deliver the eggs in accordance with the contract. This provision covered every case of contract deviation which could possibly injure the Government. The Court below in the majority opinion interpreted the con-

tract as also imposing, in paragraph 7, the same heavy damages for omission to have the certificates ready on May 18 even though the petitioner was not legally permitted to make delivery until a later date when the Government demanded shipment at which later time the eggs and the certificates were ready and were delivered. Since paragraph 9 would cover a case of failure to have the certificates ready on May 18 followed by failure to make proper delivery, it seems clear that paragraph 7 (if construed correctly by the Court) was intended to cover only the case where there was no failure to deliver according to the contract and consequently no possibility of injury, and where there was merely a technical omission to have the certificates ready on May 18—several days before the Government was prepared to accept or even permit delivery.

The provision for damages for such a technical omission without possibility of injury could not have been inserted in the contract as a pre-estimate of just compensation for harm anticipated from such an omission. The provision could only have been made to be held *in terrorem* over the petitioner in order to force performance through fear of an arbitrary, excessive exaction having no relationship to probable or even possible injury from a breach. In holding that the damages were properly imposed, the decision below is in plain, flat, hopeless conflict with a fundamental principle of the law of contracts firmly and uniformly established in decisions of this Court and other authorities. This is the principle that to be enforceable, a contractual provision fixing damages for a future breach must reflect a reasonable forecast of the damage likely to result from that breach.

The only procedure for correcting the total disregard in the decision below of this hitherto universally recognized

principle of contract law and to avoid serious confusion from such an unprecedented departure from existing law is for this Court to exercise its power of supervision over a trial court from which there is no appeal as a matter of right.

ARGUMENT

I

It was from the outset impossible that the FSCC could suffer any damage whatever for the omission (to have the eggs certificated before the FSCC was ready for delivery) for which damages were imposed upon the petitioner.

The contract clearly provided in paragraph 9 that the petitioner should pay damages if it failed to make delivery in accordance with the provisions of the contract (R. 22-23). One of the contract provisions gave the FSCC the right to demand shipment by the petitioner on May 18 and on any day within nine days thereafter. Failure to deliver according to the contract—whether for failure to have the certificates ready when the FSCC should demand shipment or for any other reason—embraced every breach which could cause harm to the FSCC.

But the contract also had an entirely separable provision in paragraph 7. This paragraph provided that the petitioner should pay the same damages (the same as in the case of failure to deliver in accordance with the contract) if the petitioner should not have the certificates ready on May 18, but should have them ready by the time FSCC demanded shipment and should make immediate delivery upon such demand.[2]

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[2] This is the interpretation given to paragraph 7 in the majority opinion below (R. 36-37). The dissenting opinion said that paragraph 7 did not impose damages in the circumstances of this case (R. 39, 40). There

It was, of course, foreseeable from the outset with certainty that the FSCC could not suffer any damage whatever for mere omission to have the certificates ready on any days which might elapse between May 18 and the day when the FSCC desired shipment. Hence, when the contract was executed the parties knew that there was no possibility of injury from the kind of omission for which damages were imposed on the petitioner under paragraph 7.

II

The provision imposing damages for omission to have the eggs certificated before the FSCC was ready for delivery did not give the FSCC "assurance" except as it was held in terrorem over the petitioner.

It may be said, as stated in the majority opinion below (R. 37), that the provision imposing damages for omission to have the certificates available on a day prior to the time when the FSCC was willing to accept delivery was needed to give the FSCC "assurance" that the eggs would be ready on May 18, and that the imposition of damages was justifiable for that reason. A brief analysis of the facts will show, however, that this provision did not and could not give the FSCC such assurance except as it was held *in terrorem* over the petitioner.

The fact is (whatever might have been the legal effect of a provision for such assurance) that the contract did not provide that the petitioner should give notice on May 18 that the certificates were ready. The FSCC did not know (and the procedure did not contemplate that it would know)

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is an inconsistency in providing (paragraph 7) that failure to have certificates ready on May 18 will invoke provisions (paragraph 9) which impose damages only for failure to make delivery, but the petitioner for the purpose of this brief accepts the construction of paragraph 7 by the majority.

whether the certificates were ready on May 18 until the records were checked subsequent to acceptance by the FSCC of all shipments here involved (R. 27, 29). Instead of depending on factual knowledge as the basis for its assurance, the FSCC relied on the imposition of damages under the provisions of paragraphs 9 and 7.

The heavy damages imposed by paragraph 9 for failure to deliver in accordance with the contract furnished a strong inducement to the petitioner to have the eggs certificated and otherwise ready by May 18. The operation of this inducement tended to give the FSCC assurance—a type of assurance which the petitioner does not criticize—that the certificates would be ready on May 18, or whenever FSCC demanded shipment.

But the FSCC also relied for such assurance on the provision of paragraph 7 which, as interpreted by the majority of the Court below, imposed damages for mere omission to have the certificates ready at a time before the FSCC was prepared to demand shipment. This paragraph did not make May 18 the delivery date but provided that the "date specified in the offer [May 18] • • • shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option" (R. 22). The petitioner had neither right nor duty nor indeed possibility of delivering on May 18 or on any other day until and unless it received notice of when and where to ship the eggs. This is so obvious that it would be superfluous to cite the many decisions from *Williston, Sales* (2d ed.), § 457, showing that the petitioner's duty was conditional on receiving such notice.

This provision in paragraph 7 imposing damages for an omission (which, as was foreseeable from the outset, could not possibly cause injury) to have the eggs certificated at a time before the petitioner had any duty or even oppor-

tunity to make delivery was clearly inserted to force the petitioner to have the certificates ready through fear of a heavy exaction. It was to be held *in terrorem* over the petitioner.

III

The decision below is in direct, open conflict with the universal rule, Federal and state, that a provision will not be enforced if it imposes damages for a default that can not possibly cause injury.

The validity of paragraph 7 imposing damages for default without possibility of injury is rather clearly governed by Federal law. *United States* v. *Allegheny*, 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366, holding inapplicable the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. But whether this case is to be decided under Federal law, under the law of the States (Iowa and Minnesota) where the contract was to be performed, or under the law of some other state, the enforceability of the damage provision is controlled by a fundamental and hitherto universal principle of the law of contracts. This is the rule that, in distinguishing a provision for liquidated damages from one for a penalty, a provision will not be upheld as one for liquidated damages unless it is a reasonable forecast of injury.

The Federal rule is set forth in a number of decisions of this Court. Differences of expression will be found in the opinions in these cases, but no case is in conflict with the latest statement of this Court that "agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced." *Kothe* v. *Taylor Trust*, 280 U. S. 224, 226. This principle was subsequently approved without citation

or discussion in *Irving Trust Co.* v. *Perry*, 293 U. S. 307, 311.

Other principal decisions of this Court on the distinction between liquidated damages and a penalty are those in *Wise* v. *United States*, 249 U. S. 361, 365-367, *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 121, and *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642, 672-674. In each case the provision for damages was sustained because the parties at the time the agreement was reached had made a reasonable pre-estimate, or at least a not greatly disproportionate estimate, of injury which might result from a future breach.

The majority of the Court below clearly misconstrued the opinion in *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, especially in relation to the intention of the parties (R. 38). In the *Bethlehem Steel* case, the United States contracted for gun-carriages while preparing for imminent war. The contract imposed $35 damages for each day of delay in delivery of each gun-carriage. Delay in delivery ensued and the United States deducted the agreed damages. There was evidence that the delay caused practically no damage. This Court held that the damage clause was for liquidated damages and not for a penalty, and stated (205 U. S., at page 121), as a main reason, that the "amount is not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages" as to establish a penalty. If the present petitioner had failed under paragraph 9 to make timely delivery, this case would have been like the *Bethlehem Steel* case. But, as pointed out in the minority opinion below (R. 39), the *Bethlehem Steel* decision allowing damages for delay in delivery (which at the time of the Bethlehem Steel contract seemed likely to cause substantial injury) is inapplicable to the present petitioner's default under para-

graph 7 which the parties from the outset knew could not possibly cause injury.

This Court, in discussing the intention of the parties in the *Bethlehem Steel* case, made it clear that the term, "liquidated damages" or "penalty," used by the parties is not of itself conclusive in deciding whether the provision is for liquidated damages or for a penalty (205 U. S., at page 120), and that the relationship of the agreed damages to the prospective probable injury is important (205 U. S., at page 121).

Whatever may be the precise effect of the intention of the parties on this question, it is clear under the authorities that no expression of intention can make a provision one for liquidated damages when it is perfectly certain that there can be no damage at all. It is only in doubtful cases that the expression of intention can have determining force.

The rule in the State courts is well illustrated by decisions in the two States (Iowa and Minnesota) where this contract was to be performed. In *Fort Dodge Co-operative Dairy Marketing Association* v. *Ainsworth*, 217 Iowa 712, 716, the Court said:

> "• • • In order that specified damages shall be deemed as liquidated, it must appear that the sum provided shall be 'fairly related to the actual damage ordinarily suffered in like circumstances.'"

To similar effect are Minnesota decisions in *J. I. Case Threshing Machine Co.* v. *Fronk*, 105 Minn. 39, 41, and *Goodell* v. *Accumulative Income Corp.*, 185 Minn. 213, 215-219.

The universality of the "reasonable forecast" rule is clearly shown in Restatement, Contracts, § 339, p. 552, and in Williston, Contracts (Rev. ed.), §§ 776-784, where many cases are cited.

This principle is set forth in Restatement, Contracts, § 339, p. 552, thus:

> "An agreement, made in advance of breach, fixing the damages therefor, is not enforceable • • • unless
>
> "(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach • • •"

And in Williston, Contracts (Rev. ed.), § 776, pp. 2183, 2184, this rule, coupled with the *in terrorem* badge of a penalty, is stated as follows:

> "• • • A penalty is a sum named, which is disproportionate to the damage which could have been anticipated from breach of the contract, and which is agreed upon in order to enforce performance • • • by the compulsion of this very disproportion. It is held *in terrorem* over the promisor to deter him from breaking his promise. Liquidated damages, on the other hand, is a sum fixed as an estimate made by the parties at the time when the contract is entered into, of the extent of the injury which a breach of the contract will cause. • • •"

The decision below upholding a provision which imposed damages for a default without possible injury and which hung *in terrorem* over the petitioner is, therefore, in direct, open conflict with a fundamental principle of the law of contracts as laid down in the uniform decisions on the point by this Court and by the other courts which have considered the question.

Conclusion

In conclusion, the decision below is in such flat conflict with all of the other decisions in this country on a fundamental principle of contract law that an exercise of this Court's power of supervision is demanded to avoid the

serious confusion which the trial court's unprecedented departure from existing law is likely to cause. It is, therefore, respectfully submitted that the petition should be granted.

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January, 1947.

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 561 16

PRIEBE & SONS, INC.,
Petitioner,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 861

PRIEBE & SONS, INC.,
Petitioner,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONER

The Government in a brief which almost entirely misconceives the issue presents one point which would be pertinent if sound. The Government states, or at least implies, that the rule to be applied in distinguishing between liquidated damages and a penalty in the case of a Government contract for war supplies should be different from the rule applied in a contract between private persons (Br.

10). This is an important question because of the large number of such contracts. The adoption of such a distinction would seem to be contrary, however, to the decision of this Court in *United States v. Standard Rice Company, Inc.*, 323 U. S. 106.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 16

PRIEBE & SONS, INC.,
Petitioner,

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Court of Claims of the United States (R. 33–40) are reported in 106 C. Cls. 789.

JURISDICTION

The judgment of the Court of Claims was entered May 6, 1946 (R. 40), and its order denying the petitioner's motion for a new trial was entered October 7, 1946 (R. 40). The petition for writ of certiorari was filed January 7, 1947, and was granted March 10, 1947 (R. 41). Jurisdiction is conferred on this Court by section 3(b)

of the Act of February 13, 1925, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, 53 Stat. 752.

QUESTION PRESENTED

Whether the provision of paragraph 7 of the contract under which damages were imposed on the petitioner was an invalid provision for a penalty or an enforceable provision for liquidated damages.

STATEMENT

The facts, found with substantial accuracy by the Court of Claims (R. 18–32), are briefly these:

The petitioner corporation and the Federal Surplus Commodities Corporation, a United States agency hereinafter called FSCC, entered into a contract on April 23, 1942, for the sale to FSCC of dried eggs (R. 18, 19). The contract provided that the petitioner would make, and the FSCC would accept, delivery at some time within a ten-day period beginning May 18, 1942, but that the particular day and the quantities of eggs and the places to which they were to be shipped were at FSCC's option (R. 19, 22, 24, 25).

The FSCC by various notices (one within the ten-day period, one before, and two after such period) directed petitioner to make immediate shipment of specified quantities of the dried eggs (R. 26, 27). These notices were promptly followed by delivery of the eggs (R. 26, 27, 29, 30). FSCC accepted the product and has never questioned its quantity or quality, nor the time or place of delivery (R. 27).

After the acceptance of the eggs, FSCC imposed damages of $11,736.40 on petitioner, based upon a contract provision calling for "liquidated damages" at ten cents a pound on so many pounds of the eggs (then stated to

amount to 117,364 pounds) as to which inspection certificates were not ready on May 18 (R. 22, 23, 27, 28). Seventeen months later, and after the petitioner had filed this suit, FSCC notified petitioner that a further sum of $2,746.50 was being imposed with respect to an additional 27,465 pounds as to which the certificates were not ready on May 18 (R. 29). After FSCC deducted the last mentioned sum from another contract payment due it, the petitioner amended its complaint and increased the amount sought to the total sum of $14,482.90, together with interest (R. 1, 7, 29).

The contract was made up of an announcement by FSCC soliciting offers, petitioner's offer, and FSCC's acceptance (R. 24). Paragraph 9 of the announcement (hereinafter referred to as paragraph 9 of the contract) provided that, since "the failure of the vendor to deliver the quantity of the commodity * * * specified * * * in accordance with the terms * * * will * * * cause serious and substantial damages to the purchaser," and since "it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages" (R. 22, 23). Under paragraph 9 the rate of damages in different contracts would vary according to the number of days between the date when the offer was accepted by the FSCC and the date specified in the offer (first day of the ten-day period), but the rate in any one contract would always be the same and would not vary by reason of the extent of any delay in delivery (R. 23). If the first day of the ten-day period was within 50 days of the date of FSCC's acceptance of the seller's offer, the rate of liquidated damages for that particular contract was to be 10 cents a pound (R. 23). The rate per pound was to increase by a graduated scale up to 30 cents a pound, which was the rate if the first

day of the ten-day period were from 246 to 311 days after the contract (acceptance) date (R. 23). As the first day of the ten-day period in this case (May 18, 1942) was within 50 days of the contract date (April 23, 1942), damages were to be imposed at the rate of 10 cents "for each pound * * * undelivered" regardless of the kind or extent of delay (R. 23, 24).

Paragraph 7 of the contract provided that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified [May 18, 1942] * * * will be cause for invoking the provisions of paragraph 9" (R. 22).

The contract provided that the vendor should arrange with an agency of the United States for inspection of the product, and should tender a grading certificate with each delivery (R. 20–22). The barrels used in shipping were to be marked with certain information concerning the product, the vendor, and the manufacturer, including a legend furnished by the FSCC (R. 21, 22).

The eggs as to which the damages were imposed had all been manufactured before May 18, 1942, and the eggs themselves were ready for delivery before that date, but the grading certificates of the Government which showed that the product was acceptable bore dates of May 20, 21, and 22, 1942 (R. 26, 27). The fact that these certificates were dated subsequent to May 18, 1942, was the basis for the imposition of damages (R. 30). The first notice to ship any of the eggs as to which damages were imposed was dated May 26, 1942 (R. 26). The other notices to ship were dated May 29 and June 4, 1942 (R. 26, 27), and with respect to the two notices last mentioned the Government itself was in default (R. 22) but no point concerning such default has been made in this case by petitioner.

The petitioner sued in the Court of Claims to recover the amount withheld with interest (R. 1, 7), but that Court, with one judge dissenting, held that the imposition of damages was proper (R. 32, 39).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the provision in question was an enforceable provision for liquidated damages rather than an invalid penalty clause.

2. In failing to hold that the amount fixed as damages for mere omission to have the certificates ready May 18, 1942, was not a reasonable forecast of just compensation for such a technical breach, and that accordingly the provision was unenforceable.

3. In failing to hold that the amount fixed as damages for mere omission to have the certificates ready May 18, 1942, was intended to be held *in terrorem* over the petitioner, and to force performance through the excessiveness of the amount, rather than to be a good faith preestimate of anticipated damages, and in failing to hold, as a consequence, that the provision was a penalty clause.

4. In attaching conclusive weight to the use of the contract term "liquidated damages" in holding that the provision was enforceable.

5. In dismissing the petition.

6. In denying the motion for a new trial.

SUMMARY OF ARGUMENT

The petitioner contracted with the FSCC to sell dried eggs. The contract provided that the petitioner should deliver the eggs at such times during a ten-day period commencing May 18, 1942, as the FSCC might select,

and that the quantities and destinations of shipments were subject to the FSCC's instructions. The petitioner was not obligated, nor even permitted, to make delivery until the FSCC gave notice of the time to deliver and the other necessary instructions.

The petitioner made deliveries according to the contract immediately upon receipt of shipping instructions and the FSCC accepted the eggs. Some time later, however, after examining various papers, the FSCC imposed damages under paragraph 7 of the contract merely because grading certificates were not ready on May 18.

The contract (paragraph 9) provided for damages for failure to deliver in accordance with the contract. This provision covered every failure which could possibly injure the FSCC. But a separate provision (paragraph 7) also provided for the same rate of damages if the certificates were not ready on May 18. Since every failure to deliver was covered by paragraph 9, the damage provision in paragraph 7 could only come into play if delivery were made in conformity with the contract. Accordingly, when the contract was entered into it was certain that the FSCC could not be injured if the petitioner made delivery according to the contract and there should be a mere failure to have the certificates ready on May 18.

The provision for damages for such a technical omission without possibility of injury could not have been inserted in the contract as a reasonable forecast of just compensation for harm anticipated from such an omission. Nor could it have been included in the contract to give the FSCC mental assurance that the certificates would be ready on May 18 since there was no procedure for advising the FSCC, until long after the fact, whether the certificates were ready on May 18. The provision could have been devised only to be held *in terrorem* over

the petitioner in order to force performance through fear of a heavy exaction. Therefore, in holding that damages were properly imposed, the decision below is in plain, flat, and hopeless conflict with the long-established fundamental of contract law that to be enforceable a contractual provision fixing damages for a future breach must reflect a reasonable forecast of the damage likely to result from that breach.

ARGUMENT

I

Performance was not due from the petitioner until the FSCC requested delivery.

The contract was for the sale of eggs. The agreed time for performance was not a fixed date, but any time or times chosen by the FSCC, pursuant to the option contained in paragraph 7, within the ten-day period beginning on May 18 (R. 14). The FSCC also had the right to direct where and in what quantities the eggs were to be delivered (R. 24, 25).

It is thus clear that performance by the petitioner was not due, nor even possible, until request was made and instructions given for delivery. This is so obvious that it would be superfluous to cite the many decisions from Williston, Sales (2d ed.), § 457, to show that the request and instructions were conditions precedent to the petitioner's performance of its duty to deliver the eggs.

II

The contractual provision under which damages were imposed upon the petitioner provided for damages because the certificates were not ready on a certain day, notwithstanding (1) that the FSCC did not request delivery until a later day, and (2) that delivery was made in strict conformity with the

contract; it was accordingly known when the contract was made that the FSCC could not suffer any damage whatever from the mere omission for which the damages in this case were imposed.

The petitioner in this case made all deliveries, promptly upon request by the FSCC, in strict conformity with the contract. The sole reason for the imposition of damages was that the certificates giving rise to this controversy were not ready on May 18, the first day of the ten-day period within which the FSCC could request delivery.

Paragraph 9 of the contract clearly provided for damages if there were any failure to deliver in accordance with the contract (R. 22, 23). Delivery could not properly be made unless the certificates were ready by the time when delivery was requested. If the FSCC had requested delivery on May 18, or on any of the nine days thereafter, and the petitioner had not complied (whether for failure to have the certificates ready or for any other reason), the damages would have been due under paragraph 9.

The only other provision of the contract imposing damages was the entirely separable provision of paragraph 7. This paragraph provided for damages (at the rate specified in paragraph 9 for failure to deliver) if the certificates were not ready on May 18 even though the petitioner should have them ready when the FSCC requested delivery and should make immediate delivery upon such request.*

It is thus clear that the contract did not provide for damages, beyond the provision in paragraph 9 which applied to all cases of failure to deliver in accordance

* This is the interpretation given to paragraph 7 in the majority opinion below (R. 36, 37) accepted for the purpose of this brief.

with the contract, except in the one very special case covered in paragraph 7. This one case was where three conditions were all present, namely, (1) the certificates were not ready on May 18, (2) the FSCC did not request delivery until a later day, and (3) delivery was made in accordance with the contract. If the FSCC requested delivery on May 18, and the certificates were not ready, then the damages would be due under paragraph 9 for failure to deliver. Or if, for some other reason, delivery was not made in accordance with the contract, the damages would likewise be imposed under paragraph 9. In neither of these cases would paragraph 7 be applicable. In other words, paragraph 7 could have application only if, as in the present case, the FSCC made its request (for delivery) after May 18, and that request was observed, and delivery made in conformity with the contract.

The only thing that could possibly injure the FSCC would be failure to get proper performance when delivery was requested. The FSCC was not interested in the certificates except as one essential of proper delivery of certificated eggs. There was no provision in the contract for currently advising the FSCC that the certificates were or were not ready on May 18, and in fact the FSCC had no knowledge until long after the deliveries had been made and accepted that the certificates were not ready on May 18.

If the petitioner had been able to perform on May 18, but because of a better offer or for other reason had refused to perform when request for delivery was made, damages could not have been imposed under paragraph 7. Nevertheless, in such case the injury and damages would have been the same as if there had been no ability to perform when the request was made. And it is

equally certain that the FSCC could not suffer damage merely because some preliminary, such as a certificate, was not ready on a specified day before performance was due, provided delivery was properly made upon request. Accordingly, when the contract was entered into it was as certain as it proved to be later that the FSCC could not suffer any damage whatever from the omission for which the damages in this case were imposed.

III

The provision under which damages were imposed was an unenforceable penalty rather than a liquidated damages provision since it was not a reasonable forecast of probable damage, but was from the outset an attempt to impose damages where the FSCC could not suffer any injury whatever.

The principles of general contract law are equally applicable to the Government.

This Court has held that the principles of general contract law are normally applicable to the Government as well as to private parties. *United States* v. *Standard Rice Company, Inc.*, 323 U. S. 106, 111; *Hollerbach* v. *United States*, 233 U. S. 165, 171, 172. The English case of *Clydebank Engineering and Shipbuilding Co., Ltd.*, v. *Castaneda*, (1905) A. C. 6, which involved a case of non-delivery of certain boats, does not state a contrary rule in England, but merely points out the desirability in government war contracts of setting up true liquidated damages provisions for non-delivery.

The reasonable forecast principle of general contract law makes a damage provision unenforceable unless the amount fixed is a reasonable forecast of probable damage.

The reasonable forecast principle is a well-established principle of general contract law which has a long history beginning with the earliest attempts of courts of equity to relieve parties from harsh contract damage provisions. Under this principle a provision for a sum disproportionate to the damages which *at the time the contract was entered into* could have been reasonably anticipated as a probable result of a subsequent breach of the contract will be held unenforceable. *Kothe* v. *Taylor Trust*, 280 U. S. 224, 226; *Wise* v. *United States*, 249 U. S. 361, 365–367; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 121; *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642, 672–674.

The universality of the "reasonable forecast" rule is clearly shown in Restatement, Contracts, § 339, p. 552, and in Williston, Contracts (Rev. ed.), §§ 776–784, where many cases are cited.

This principle is set forth in Restatement, Contracts, § 339, p. 552, thus:

> "An agreement, made in advance of breach, fixing the damages therefor, is not enforceable * * * unless
>
> "(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach * * *."

The Federal law controls, but this is unimportant since the reasonable forecast principle is so uniformly established.

The validity of the damage clause in paragraph 7 of the contract is rather clearly governed by Federal law. *United States* v. *Allegheny*, 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366, holding inapplicable the rule of *Erie Railroad Co.* v. *Tomp-*

kins, 304 U. S. 64. But it does not seem important whether the case is controlled by Federal law or by the law of the District of Columbia or of some state. In the usual case the validity of liquidated damages is determined by the law of the place of contracting. Goodrich, Conflict of Laws (2d ed.), § 88, p. 218. The contract was entered into, either in the District of Columbia where the contract was accepted, or in Illinois which was the situs of the petitioner's principal place of business where the petitioner performed all its acts leading up to the making of the contract. The contract was to be performed in Iowa and Minnesota. Regardless of whether the case is to be decided under Federal law or under the law of one of the other jurisdictions, the enforceability of the damage provision is controlled by the same fundamental and hitherto almost universally recognized principle of law. *Davy* v. *Crawford*, 79 U. S. App. D. C. 375; *Fort Dodge Co-operative Dairy Marketing Association* v. *Ainsworth*, 217 Iowa 712, 716; *Holt* v. *Doty*, 193 Iowa 582; *Meuwissen* v. *Westerman Lumber Co.*, 218 Minn. 477, 483, 486; *Goodell* v. *Accumulative Income Corp.*, 185 Minn. 213, 215-216; *Schommer* v. *Flour City Ornamental Iron Works*, 129 Minn. 244, 246, 247; Prentice, Liquidated Damages in Illinois, 31 Ill. L. Rev. 879; Williston, Contracts (Rev. ed.), §§ 776–784.

The Bethlehem case on which the Court below relied is consistent with the reasonable forecast principle.

In the single case cited by the Court of Claims (R. 38), *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, the rule adopted is consistent with the reasonable forecast principle. In the *Bethlehem* case, the United States contracted for gun-carriages while preparing for imminent war with Spain. The contract imposed $35 dam-

ages, computed upon the basis of a reasonable formula (205 U. S. at p. 109), for each day of delay in delivery of each gun-carriage. Delay in delivery ensued and the United States deducted the agreed damages. The Bethlehem Company gave evidence that, due to the abrupt end of the war, the delay caused practically no damage, and contended that the amount imposed was disproportionate to the damages actually suffered. This Court held that the damage clause was for liquidated damages and not for a penalty. In the opinion Mr. Justice Peckham stated (p. 121):

> "The amount is not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages as to show that the parties must have intended a penalty, and could not have meant liquidated damages."

The distinction between the *Bethlehem* case and the case at bar is clear if one considers the reasonableness of the forecast of damages for (under the reasonable forecast principle) the reasonableness of the forecast is to be determined as of the time when the agreement is made. In the *Bethlehem* case it appeared when the contract was entered into that delay in delivery would result in substantial injury. But in the present case it was known when the contract was made that failure to have the certificates ready on May 18 (unless followed by failure to deliver which would require the imposition of damages under paragraph 9) could not cause any damage whatsoever.

The Court of Claims made certain references, in the same paragraph which cited the *Bethlehem* case (R. 38), to the agreement of the parties and the intendment of the contract as to whether the amount imposed was

liquidated damages or a penalty. This suggests that the Court may have relied upon certain references in the *Bethlehem* opinion to the intention of the parties. But this Court made it clear that the term "liquidated damages" or "penalty," used by the parties is not conclusive in deciding the question (205 U. S. at p. 120). It could not be otherwise for if a statement of intention of the parties were the controlling factor, then every penalty clause, if labeled "liquidated damages," could be enforced. Williston, Contracts (Rev. ed.), § 778.

It thus seems clear that the Court of Claims either misunderstood the rule of the *Bethlehem* case or was unaware of the determinative difference in the facts of the two cases. The *Bethlehem* decision supports the petitioner's right to recover.

The provision imposing damages for omission to have certificates ready on a certain day (under circumstances where there could not be any damage) was inserted in the contract to make more certain that the petitioner, through fear of a heavy exaction, would have the certificates ready on that day; such a provision was a violation of the reasonable forecast rule and was, therefore, a penalty and not enforceable.

It is evident that the purpose of the controverted provision of paragraph 7 (imposing damages in case the certificates were not ready on May 18 where timely delivery was made) was to give greater certainty that performance would be rendered on any day thereafter when the FSCC should give notice and instructions to deliver.

Since the contract did not provide that the petitioner should on or before May 18 give notice to the FSCC that the certificates were ready, the provision could not have been placed in the contract to give the FSCC increased

mental assurance, through receipt of advice of readiness to perform, that the contract would be performed on time. It could have been inserted only to force the petitioner, through fear of a heavy exaction, to have the certificates ready on May 18. The provision was not intended to be a reasonable forecast of probable damage for there could not be any damage, but was designed to be held *in terrorem* over the petitioner.

It may be conceded that in this contract and in any contract there will be greater certainty of timely performance if the promisor is subjected to heavy damage if he has not completed all necessary preparations some days before performance is actually due. But lack of this certainty can not cause actual damage. In spite of not being ready some days beforehand, the promisor may, as in this case, perform when performance is due; if this is done, the promisee does not suffer injury. This fact was as mathematically certain when the contract was entered into as it proved to be afterward.

Whether the provision in question was drafted to give the FSCC increased mental assurance of readiness to perform (which, as mentioned in the second paragraph under the present sub-heading, seems impossible), or to force the petitioner, through fear, to have the certificates ready on May 18, it was clearly not a reasonable forecast of probable damage. As such, it was a penalty and, therefore, not enforceable. Williston, Contracts (Rev. ed.), § 776, pp. 2183, 2184; McCormick, Liquidated Damages, 17 Va. L. Rev. at p. 104 et seq. and p. 111 et seq.; Loyd, Penalties and Forfeitures, 29 Harv. L. Rev. 117 (history of rule).

CONCLUSION

The judgment of the Court of Claims should be reversed and the cause remanded with directions to enter judgment for the petitioner.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1946

PRIEBE & SONS, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinions of the Court of Claims (R. 33–40) are reported at 65 F. Supp. 457.

JURISDICTION

The judgment of the Court of Claims was entered on May 6, 1946 (R. 40). A motion for new trial was overruled on October 7, 1946 (R. 40). The petition for a writ of certiorari was filed on January 7, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether paragraph 7 of the "Announcement FSC–553" of the Agricultural Marketing Administration, providing for the assessment of liquidated damages for "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified", is an enforceable provision for liquidated damages and not a penalty.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of Announcement FSC–553 (R. 19–24), which by its terms, became a valid and binding contract between petitioner and the Federal Surplus Commodities Corporation upon the acceptance of petitioner's offer, are set forth in the Appendix, pp. 14–17.

STATEMENT

The facts as found by the Court of Claims may be briefly summarized as follows:

In April 1942, the Agriculture Marketing Administration (AMA), an agency of the Department of Agriculture, issued its "Announcement FSC–553" stating that it would consider offers for the sale of dried egg products (R. 19). The announcement further stated that its "terms and provisions * * * shall become a part" of any offer submitted and that upon acceptance of any such offer by the Federal Surplus Commodities

Corporation (FSCC), another agency of the Department of Agriculture, "the offer and acceptance shall constitute a valid and binding contract" (R. 19–20).

On April 22, 1942, petitioner submitted, by telegram, an offer to sell a large quantity of such products for delivery on various dates and at several shipping points. Included therein were 90,000 pounds "for delivery on or before May 18 * * * FOB. Sleepy Eye, Minnesota" and 110,000 pounds for delivery on or before the same date "FOB Manning, Iowa" (R. 24). The following day, AMA, by telegram, accepted petitioner's offer, enumerating the various poundages and delivery points, including 200,000 pounds for "May 18 delivery" (R. 24), and the next day, petitioner confirmed the contract, again referring to 200,000 pounds for "May 18 delivery" (R. 24). This proceeding involves only that portion of the agreement dealing with the 200,000 pounds at Manning, Iowa, and Sleepy Eye, Minnesota and, specifically, with 144,829 of the 200,000 pounds (R. 24–25).

Following the general procedure adopted for these and other deliveries, petitioner requested AMA to inspect the lots as the manufacture of the product was completed (R. 25). Pursuant to that request, an AMA representative visited petitioner's plant and made test weights and certain checks, such as the date of manufacture of the

powder and whether the barrels complied with the contract specifications and requirements as to markings; the representative also took samples of the various lots and forwarded them, together with his report, to the AMA laboratory at Chicago, Illinois (R. 25). The laboratory then analyzed and graded the powder for compliance with the contract specifications and issued a certificate setting forth, among other things, the results of the sampler's investigation and the laboratory analysis, and the contract involved (R. 25). The certificates were dated as of the dates of the completion by the laboratory of its analysis of the lots covered by the various samples (R. 25), which was, for the lots here involved, from May 20 to May 22 (R. 26, 27). Six certificates were issued covering these lots, 3 being dated May 20, 1 May 21, and 2 May 22 (R. 27).[1] Immediately upon such completion, petitioner was notified by wire as to the results of the laboratory analyses and the numbers of the AMA certificates covering the various lots (R. 25).

Respondent, by written notices dated May 26, May 29, and June 4, 1942, gave petitioner orders to ship "immediately" the various lots comprising

[1] Petitioner has nowhere suggested, nor does it now suggest, that the AMA inspection and analyses were not promptly completed, or that AMA in any way caused petitioner's failure to have the product here involved inspected and ready for delivery on May 18.

the 144,829 pounds (R. 26).[2] Petitioner shipped the lots referred to in the May 26 notice on the same day (R. 26); the lots referred to in the May 29 notice were shipped on June 2 (R. 26); and those referred to in the June 4 notice were shipped on June 5 (R. 26–27).

Subsequently, in accordance with paragraph 7 of Announcement 553, Appendix, pp. 15–16, the United States, by two deductions, deducted from undisputed balances owing to petitioner, the sum of $14,482.90 as liquidated damages of 10¢ per pound on these lots which were covered by the AMA inspection certificates dated May 20, 21, and 22 (R. 27–28, 29). Petitioner appealed the first deduction to the President of the FSCC, but its appeal was denied by the President after he first, however, referred the matter to a departmental committee for consideration and advice, and, subsequently, upon the renewal of the appeal, to the Solicitor of the Department of Agriculture. Both the unanimous Committee and the Solicitor recommended that the assessment not be remitted (R. 29).

Petitioner sued in the Court of Claims to recover the damages with interest (R. 1, 7) but

[2] Since FSCC requested the latter two deliveries after the expiration date of the ten day period provided, FSCC would have entertained a claim to reimburse petitioner for such excess costs as it may have incurred for storage beyond that period (R. 32). Petitioner has, however, made no such claim (R. 32).

that court held that petitioner was not entitled to recover and ordered the petition dismissed (R. 32).

ARGUMENT

The court below apparently accepted as valid the proposition urged by petitioner (Pet. 4, 12–16) that an agreement fixing damages for a future breach of contract at an amount which is not a reasonable forecast of just compensation for the injury anticipated from the breach would be a penalty and not enforceable. It held, however, that that proposition was not applicable in the present case, since, as it construed the contract, the liquidated damages provision here involved did not constitute a penalty (R. 38).

Petitioner attempts to attack that holding by relying on a construction of paragraph 7 which, it states, the court below adopted and which petitioner purportedly accepts for the purpose of the petition (Pet. 9, n. 2). According to petitioner, the court below construed paragraph 7 as containing an entirely separable provision which imposes liability for liquidated damages where the certificates were not ready on May 18 but were ready by the time delivery was demanded and made (Pet. 4, 9). Contrary to petitioner's statement, however, a reading of the decision below clearly demonstrates that that court did not so construe paragraph 7. In the court below, petitioner urged in effect the same construction

of paragraph 7 which it now suggests the court below adopted. (R. 36). The Court of Claims, however, rejected that contention, holding that "the language of paragraphs 1, 3, 4, 7, and 9 relating to the delivery date, inspection certificates and liquidated damage is very plain and unambiguous, and there is no room for construction" (R. 36). And in regard to the contention that the liquidated damage provision of paragraph 7 constituted a penalty in the circumstances of the present case, the court below said:

> We can find nothing in the contract or in the evidence which would justify the conclusion that the contract intended that the sum agreed to be paid would be liquidated damages if the eggs were called for on May 18 and were not then inspected and ready and would be a penalty if such eggs were not inspected and ready on that date but not called for prior to issuance of the required inspection certificate. On the contrary the circumstances and the language used by the parties negative such an interpretation of the contract. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 118–122 (R. 38).

This conclusion, we submit, is correct. Paragraph 7 clearly provides for the assessment of liquidated damages for "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer." As the court below found, the phrase

"undelivered in accordance with the terms of this announcement" appearing in paragraph 9 must be read in the light of paragraph 7 and when so read, it is clear that the phrase meant the delivery date of May 18. (R. 37.) For, although under paragraph 7, FSCC was allowed a period of 10 days after the contract delivery date within which to call for shipment of products, "the particular day within the period being at the FSCC's option," it decided to make absolutely certain that the products would be inspected and ready for delivery by the "day specified in the offer" which was "the first day" of the "ten-day period" (paragraph 7)..

The reasons for the provision imposing liquidated damages for failure to have the product inspected and ready for delivery on the date specified in the contract are set forth in Findings 16 and 17, giving the history of the provision (R. 31–32), and may be briefly summarized as follows: Shortly after the Lend-Lease Act of March 11, 1941, 55 Stat. 31, was enacted, the Department of Agriculture, through the FSCC, embarked on a large-scale program of purchasing dried eggs to alleviate the food shortages of our European allies. FSCC had its operation scheduled on a monthly basis to meet its commitments to these countries. The program was, however, necessarily affected by the shipping situation and had to be correlated with it. Shipping space was at

a premium and it was imperative that no vessel depart with unfilled space because of the failure of a producer to have his product ready by the time specified in his offer. The urgency related to time and not considerations of cost. Much of the powder was shipped directly to vessels, but incoming vessels were often delayed in arriving. When the powder was first destined for shipment to a packaging plant for packaging in containers suitable for consumer use, it frequently happened that the plants would be operating at capacity and could not absorb any more powder. In addition, powder would sometimes be shipped to cold storage warehouses as an incident to the packaging program or to await incoming convoys. Occasionally, however, such warehouses would be filled to capacity. The purpose of allowing FSCC 10 days after the contract delivery date to accept actual delivery was to give FSCC some leeway in its program to meet these contingencies. Thus it was considered imperative at all times for the producer to have his product inspected and ready for delivery by the date specified in his offer, which was the first day of the 10-day period within which FSCC, at its option, could take actual delivery, so that FSCC could at all times be assured as to how much powder was available on a certain date for shipment out of particular places as incoming convoys arrived or as packaging and cold storage plant facilities opened up.

The planning of the entire operation was keyed to these dates, and FSCC considered it of prime importance to have the products inspected and ready for delivery by such dates.

If FSCC had needed the products on May 18 and they were not ready, the Government would be damaged by the resulting injury to the war effort which could not be measured in dollars and cents. In these circumstances, "it would be almost necessarily impossible to show what damages (if any) might or naturally would result from a failure to fulfill the contract." *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 121. Especially in a Government contract for war supplies, this would be reason enough to uphold a stipulation for damages not unreasonable on its face. *Ibid.*; *Clydebank Engineering & Shipbuilding Co., Ltd.* v. *Castaneda*, [1905] A. C. 6. Consequently, the familiar earmark of a penalty—the fixing of amounts entirely disproportionate to the damage which might result—is not present and the provision herein involved is clearly a true liquidated damage provision. *Wise* v. *United States*, 249 U. S. 361, 365–367; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 121; *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642, 672–674. Cf. *Irving Trust Co.* v. *Perry Co.*, 293 U. S. 307, 311. Nor does the fact that the clause is also designed to assure and encourage compliance adversely affect

its validity. *Fidelity & Deposit Co.* v. *Walker,* 75 F. 2d 115 (C. C. A. 5). In a sense, all liquidated damage provisions are so designed. *Clydebank Engineering & Shipbuilding Co.* v. *Castaneda, supra,* at pp. 19–20.

Petitioner's basic complaint seems to be that that there was no actual delay in delivery when shipment was ultimately called for, that the Government was, therefore, not damaged, and that the contract should, accordingly, be construed as imposing liquidated damages only when there is a failure of shipment when requested and when there is, consequently, damage. But in considering whether a provision for liquidated damages is actually a penalty, it is not proper, after the default, to explore the question of whether in fact any damage flowed from the breach. The contract is viewed as of the time when the parties enter into it. *United States* v. *Bethlehem Steel Co., supra; Wise* v. *United States, supra; Frick Co.* v. *Rubel Corp.,* 62 F. 2d 765 (C. C. A. 2). That it turns out that there is no actual damage is immaterial. *United States* v. *Bethlehem Steel Co., supra; Byron Jackson Co.* v. *United States,* 35 F. Supp. 665 (S. D. Cal.). Indeed, the parties seeking to enforce a liquidated damage provision may even have benefited and profited by the de-default. The provision is nontheless enforceable. *Barnette* v. *Sayers,* 289 Fed. 567 (App. D. C.); *Blackwood* v. *Liebke,* 87 Ark. 545, 553.

Accordingly, in determining whether a provision for liquidated damages is in fact a penalty, it is necessary to seek the intention of the parties in the light of the circumstances existing at the time they entered into the contract (*United States* v. *Bethlehem Steel Co., supra; Sun Printing & Publishing Association* v. *Moore, supra*), and "the purpose the agreement seeks to subserve" (*Beiser* v. *Kerr,* 107 Ind. App. 1, 9). "When such intention is ascertained, it is ordinarily the duty of the court to carry it out" (*United States* v. *Bethlehem Steel Co., supra,* at p. 119). Furthermore, courts are no longer disposed to hold that agreed stipulations for liquidated damages—specifically declared to be so by the parties, as in the present case—are penalties. *Sun Printing & Publishing Association* v. *Moore, supra; Wise* v. *United States, supra; In re Outfitters' Operating Realty Co.,* 69 F. 2d 90, 92 (C. C. A. 2); *Hickey* v. *United States,* 65 C. Cls. 729, 737. In view of these fundamental principles, it is submitted that the provision of paragraph 7 is an enforceable provision for liquidated damages and not a penalty.

CONCLUSION

The decision below is correct, there is no conflict and no question of general importance is presented. The petition for a writ of certiorari should therefore be denied.

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FEBRUARY 1947.

APPENDIX

The pertinent provisions of the Announcement FSC–553 are as follows:

HOW TO SUBMIT AN OFEER

Offers * * * must state the following:

* * * * * *

b. The number of pounds * * * offered at each delivery point.

c. The beginning date of the delivery period during which the vendor agrees to make delivery (N. B. Par. 7—*Delivery*).

* * * * * *

TERMS AND CONDITIONS

* * * * *

PAR. 3. *Quality.*—Dried egg products delivered shall be those specified for each lot and shall conform to the following applicable specifications:

* * * * *

PAR. 4. *Inspection and Grading.*—(a) Inspection of the product intended for delivery shall be performed by the Agricultural Marketing Administration of the United States Department of Agriculture, and it shall be incumbent upon the vendor to arrange with the AMA for inspection services. Inspection and weight certificates shall be issued at the expense of the vendor. Inspection and weight certificates shall be dated not more than 30 calendar days prior to the delivery date specified in the offer. The lots delivered to the FSCC must be the

lots sampled and inspected by the AMA, and the grading certificates tendered the FSCC must name the manufacturer of the product, his identifying production lot number for the barrels in question, and the date of manufacture. Dried whole egg * * * manufactured more than 30 days prior to the delivery date specified in the offer will not be acceptable to the FSCC. In addition to the grading certificate, the vendor * * * must tender with each delivery an affidavit, on form prescribed, attesting to the date of manufacture of the product. * * *

PAR. 7. *Delivery.*—The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option. Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of Paragraph 9 below. The only exception against invoking the provisions of Paragraph 9 shall be when sampling and inspection by the Agricultural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer, pursuant to item C and the sampling and inspection services were not forthcoming.

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificate issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement. Vendors shall take whatever steps are

necessary to protect fully the dried egg products prior to delivery to the FSCC. Such protection within the prescribed delivery period shall be at the expense of the vendor.

Delivery shall be made at the point (or points) specified in the offer, f. o. b. railroad cars, or, at the option of the FSCC, f. o. b. truck or local warehouse specified by the FSCC.

* * * * *

PAR. 9. *Delays—Damages: Payment.*—Inasmuch as the failure of the vendor to deliver the quality of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below for each pound of dried egg product undelivered in accordance with the terms of this announcement.

Contracted Delivery Date (Date Specified in Offer):	*Liquidated Damage sum*
Within and including 50 days of Acceptance date	$0.10
51 to 115 days from acceptance date, inclusive	.15
116 to 180 days from acceptance date, inclusive	.20
181 to 245 days from acceptance date, inclusive	.25
246 to 311 days from acceptance date, inclusive	.30

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of esti-

mating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for such time as he deems reasonable under the circumstances and in view of the urgent needs of the purchaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor, and the determination of the President of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

Payment of vendor's invoice will be made as soon as practicable after submission of the correct claim or claims, and payment will be contingent upon compliance with conditions set forth in this announcement.

PAR. 10. *Contract of Sale.*—This announcement, together with the offer and acceptance, shall constitute the contract of sale between the vendor and the Federal Surplus Commodities Corporation.

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JURISDICTION

The judgment of the Court of Claims was entered on May 6, 1946 (R. 40). A motion for new trial was overruled on October 7, 1946 (R. 40). The petition for a writ of certiorari was filed on January 7, 1947, and was granted on March 10, 1947 (R. 41). The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

In 1942 the United States and the petitioner entered into a contract for the sale and delivery of powdered eggs. The contract specified the "delivery date" as May 18, 1942, which was the first day of a ten-day period within which the Government would accept delivery, the particular day within the period being at the Government's option. It was expressly provided that the Government should be entitled to liquidated damages if petitioner should fail to have the eggs inspected and ready for delivery on May 18, 1942. Petitioner failed to have the eggs inspected and ready for delivery on that date. However, the Government, exercising its option under the contract and without knowing of petitioner's breach, did not call for delivery until several days later. At that time petitioner was ready to deliver and promptly did so.

The question presented is whether the provision for liquidated damages, although expressly giving the Government a right to recover in such circumstances, should be denied enforcement on the ground that it constitutes a "penalty".

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent statutory and contractual provisions involved are set forth in the Appendix, pp. 38–42.

STATEMENT

This suit was brought by petitioner in the Court of Claims to recover $14,482.90 under a contract for the sale of dried egg products, entered into between the Federal Surplus Commodities Corporation (FSCC), an agency of the Department of Agriculture under the immediate supervision and control of the Agricultural Marketing Administration (AMA), and petitioner (R. 18). The sum claimed by petitioner was deducted by the Government, as liquidated damages under Paragraph 9 of the contract, from undisputed balances otherwise due (R. 18). The facts found by the Court of Claims are undisputed and may be summarized as follows:

Following the enactment of the Lend-Lease Act of March 11, 1941 (55 Stat. 31), the Department of Agriculture, through the Federal Surplus Commodities Corporation, inaugurated a large-scale program for the purchase of dried egg products to alleviate the food shortages of our European allies (R. 31). Extensive plans were made in cooperation with the industry for the production and purchase by the Government of such products; the entire operation was scheduled on a monthly basis, and had to be correlated with the shipping situation, which was then very tight (R. 31). Petitioner, one of the largest producers, began the production of dried eggs almost as soon

as the Government program was inaugurated; it was fully familiar with the program, the details of the Government operation, and the relationship of the program to the war effort (R. 32).

The contract here involved was entered into pursuant to AMA Announcement FSC–553 of April 14, 1942, Appendix, pp. 38–42 (R. 19–24). This announcement stated that the AMA would consider offers for the sale of dried egg products; and, further, that its "terms and provisions * * * shall become a part" of any offer submitted, and that "upon acceptance by the Federal Surplus Commodities Corporation * * * the offer and acceptance shall constitute a valid and binding contract" (R. 19–20). Detailed provisions of the announcement set forth the quality standards of the finished product; gave instructions for packaging and marking; and made it incumbent upon each vendor to arrange with the AMA for inspection of the product to be delivered (R. 20–22).

By Paragraph 7, the delivery date specified by each vendor in his offer would be the first day of a ten-day period within which the FSCC, at its option, would accept delivery (R. 22).[1] Para-

[1] A single exception, not here relevant, was made in these cases where inspection had been requested by the vendor at least ten days prior to the date specified in the offer and the sampling and inspection services were not forthcoming (R. 22). It was considered that an average of 10 days was required to complete inspection following the manufacture of the eggs. This covered the time required to sample the

graph 7 further provided that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking" the liquidated damages provision of Paragraph 9 (R. 22). The provision permitting the FSCC at its option a ten-day period following the specified contract delivery date was inserted because deliveries had to be scheduled so as to fit into the varying shipping situation. Much of the egg powder was shipped directly to incoming vessels whose arrivals were frequently delayed. Other lots of powder were shipped to packing plants for packaging in containers suitable for consumer use; often these plants were filled to capacity and were unable to absorb any more powder. In addition, powder was shipped to cold storage warehouses as an incident to the packaging program or to await incoming convoys. At times, even these were filled to capacity. The ten-day period allowed the FSCC leeway in its program to meet such contingencies (R. 31–32).

Paragraph 9 contained a graduated scale of damages described as the parties' reasonable forecast of the probable loss that the Government

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finished product, mailing time to the AMA laboratory at Chicago, Illinois, and time required for processing the samples through the laboratory (R. 25). Thus, this exception provides that where sampling had been requested by the vendor in adequate time and inspection had not been completed prior to the delivery date specified, no liquidated damages would be imposed.

would suffer by reason of vendor's failure to deliver the eggs in accordance with the terms of the announcement (R. 23). It stated that "because of the urgent need for the commodity by the purchaser arising from the present emergency conditions", failure of the vendor to deliver the quantities of the commodity or commodities specified in the contract in accordance with the terms of the announcement would "cause serious and substantial damages" to the Government, the amount of which, however, it "will be difficult, if not impossible, to prove"; that the vendor therefore agreed to pay a schedule of liquidated damages ranging from 10 to 30 cents per pound, dependent upon elapsed time between the acceptance date and the contract delivery date (i. e., May 18, 1942); that the sums specified were agreed upon "as liquidated damages and not as a penalty"; and that the parties computed and agreed upon the sums named "as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result" (R. 22–23). Paragraph 9 further provided that the President of FSCC might extend the time for delivery where the failure to make delivery was due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor (R. 23).

On April 22, 1942, petitioner submitted a telegraphic offer to sell, subject to the terms of Announcement FSC–553, a large quantity of dried

egg products for delivery on various dates and at several shipping points (R. 16). Included therein were 90,000 pounds "for delivery on or before May 18 * * * fob Sleepy Eye, Minn." and 110,000 pounds for delivery on or before May 18 "Manning, Iowa" (R. 24). On the following day, AMA telegraphically accepted petitioner's offer, enumerating the various quantities and delivery points, including the 200,000 pounds for "May 18 delivery" (R. 24). Petitioner confirmed the sale contract on April 24, 1942, again referring to the 200,000 pounds for "May 18 delivery" (R. 24). The present action involves 144,829 of the 200,000 pounds of eggs.[2]

Following the general procedure adopted for these and other deliveries, petitioner requested AMA to inspect the lots as the manufacture of the product was completed (R. 25).[3] Pursuant to that request an AMA representative visited petitioner's plant and made test weights and certain checks, such as the date of manufacture of the

[2] The court below found that timely inspection had been made of 54,945 of the total 200,000 pounds, and that shipment thereof had been made before May 18. The shipment of that portion of the dried eggs is not material to this suit (R. 26).

[3] Petitioner has admitted that it was at fault in not having the powder ready for delivery on May 18 (R. 36); the manufacture of the powder here involved was completed between May 9 and May 16, and its inspection completed between May 20 and May 22 (R. 27). Ten days were ordinarily required to complete inspection. See note 1, *supra*, p. 4.

powder and whether the barrels complied with the contract specifications and requirements as to markings; the representative also took samples of the various lots and forwarded them, together with a report of his findings, to the AMA laboratory at Chicago, Illinois (R. 25). The laboratory then analyzed and graded the powder for compliance with the contract specifications and issued a certificate setting forth, among other things, the results of the sampler's investigation and the laboratory analysis, and the contract involved (R. 25). The certificates were dated as of the dates of the completion by the laboratory of its analysis of the lots covered by the various samples (R. 25), which was, for the lots here involved, from May 20 to May 22 (R. 26, 27). Six certificates were issued covering these lots, three being dated May 20, one May 21, and two May 22 (R. 27). Immediately upon such completion, petitioner was notified by wire as to the results of the laboratory analyses and the numbers of the AMA certificates covering the various lots (R. 25).

The FSCC, by written notices dated May 26, May 29, and June 4, 1942, gave petitioner orders to ship "immediately" the various lots comprising the 144,829 pounds (R. 26).* Petitioner shipped

* Since FSCC requested the latter two deliveries after the expiration date of the ten-day period, FSCC would have entertained a claim to reimburse petitioner for such excess costs as it may have incurred for storage beyond that period (R. 32). Petitioner has, however, made no such claim (R. 32).

the lots referred to in the May 26 notice on the same day (R. 26); the lots referred to in the May 29 notice were shipped on June 2 (R. 26); and those referred to in the June 4 notice were shipped on June 5 (R. 26–27).

Subsequently, in accordance with Paragraphs 7 and 9 of Announcement FSC–553, Appendix, pp. 38–42, the United States, by two deductions, deducted from undisputed balances owing to petitioner the sum of $14,482.90 as liquidated damages of 10 cents per pound on these lots which were covered by the AMA inspection certificates, dated May 20, 21, and 22 (R. 27–28, 29). The assessment of liquidated damages was based on the fact that inspection of the product was not completed until after May 18, the first day of the ten-day period within which the Government had option to order delivery, and that, in consequence, the powder was "undelivered in accordance with the terms of this announcement" (Paragraph 9) because of petitioner's "failure to have the specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer" (R. 30). Petitioner has nowhere suggested, nor does it now suggest, that the AMA inspection and analyses were not promptly completed, or that AMA in any way caused petitioner's failure to have the product inspected and ready for delivery on May 18 (R. 34).

Petitioner appealed the first deduction to the President of the FSCC. The appeal was denied

after the President first, however, referred the matter to a departmental committee for consideration and advice and, subsequently, upon the renewal of the appeal, to the Solicitor of the Department of Agriculture (R. 29). Both the unanimous committee and the Solicitor recommended against remission of the assessment (R. 29).

Petitioner thereupon brought this suit in the Court of Claims to recover the damages with interest (R. 1–8). That court held that there had been a breach of contract for which the United States was entitled to liquidated damages, and that the provision here involved did not constitute a penalty. Accordingly, it dismissed the petition. (R. 38.)

SUMMARY OF ARGUMENT

As a matter of construction, the contract is unambiguous in providing that a failure by petitioner to have its product inspected and ready for delivery on May 18, 1942, as required by Paragraph 7, would constitute a breach of contract for which the United States would be entitled to liquidated damages under Paragraph 9. This construction was made by the court below, and petitioner does not challenge it here.

Since the contract is to be so construed, no reason exists for not enforcing it according to its terms. Those who entered into it on behalf of the Government were fully authorized by law to include provisions for liquidated damages such as

that here involved; and there are no considerations of policy which would justify judicial excision of the provision from the contract. The provision for liquidated damages was designed to give the Government substantial assurance that contractors would not disrupt the time-table of war shipments by making tardy deliveries. The validity of such a provision is judged as of the time of the making of the contract; and we submit that, judged by the standards of necessity and reasonableness appropriate to the successful execution of a Government food procurement program in time of war, the liquidated damages provision in this contract was entirely reasonable and proper, and should not be denied enforcement.

The provision for liquidated damages is not rendered unenforceable because of any superficial resemblance it may bear to so-called "penalty" clauses in ordinary contracts between private parties. Relying on familiar principles in the law of contracts, petitioner contends that its failure to have its product ready for delivery on May 18, 1942, was at most only a "technical" breach not resulting in damage to the United States, and that a stipulation for liquidated damages for a future breach can not be enforced unless it reflects a reasonable forecast of the damage likely to result from that breach. While it may be doubted whether the general principles upon which petitioner relies can be made the basis for striking

down a provision in a Government contract entered into pursuant to authority granted by Congress, and which has been voluntarily accepted by both parties, we submit that the liquidated damages provision in this case is valid even as judged by the criteria which petitioner urges.

In essence, petitioner would measure the validity of the provision by its reasonableness in relation to the damage sustained by the breach. The circumstances in which this contract was made were such that the Government, and the war effort in which it was then engaged, were unquestionably damaged by contractors' failures to be ready to deliver on the specified contract dates. This contract was only one of a large number of similar agreements providing for the purchase by the Government of dried egg products for shipment to Great Britain and the Soviet Union pursuant to lend-lease. Time was of the essence since deliveries had to be timed to fit into the then critical shipping situation. In making these contracts, the Government was not bargaining for causes of action for liquidated damages. What did concern the Government, and most vitally, was that there should be deliveries on schedule and that goods should be ready for delivery on the dates specified in the contracts so that they could promptly be shipped if a vessel was ready to transport them. Recovery of liquidated damages from contractors, no matter how

large in amount, could not compensate the Government for the irreparable—and indeed unmeasurable—damage to the war effort which would result from a ship's leaving for Europe with its hold partially empty.

If a contractor could risk a "technical" breach in failing to have his goods ready for delivery on the contract date, in the hope that his tardiness would cost him nothing if it should develop that the Government was not ready to accept delivery on that date, it would inevitably increase the number of such failures when the Government did call for the goods. The liquidated damages provision therefore had to be enforced in the cases of failures to be ready to deliver, even where they might not be harmful to the war effort, in order to deter such failures where they might be harmful. This function of the liquidated damages provision, no matter what label be applied to it, was reasonable and justifiable in the circumstances in which contracts of this character were negotiated.

In any event, this Court has repeatedly held that the intention of the parties is controlling in determining whether a disputed provision in a Government contract constitutes "liquidated damages" or a "penalty." Here there is no question as to the intention of the parties; nor is there warrant for judicial refusal to carry out the parties' agreement according to the terms which both voluntarily accepted.

ARGUMENT

THE CONTRACT VOLUNTARILY MADE BY THE PARTIES EXPRESSLY PROVIDED FOR LIQUIDATED DAMAGES FOR FAILURE TO HAVE THE EGGS INSPECTED AND READY FOR DELIVERY ON MAY 18, 1942. PETITIONER COMMITTED SUCH A BREACH, AND NO REASON EXISTS FOR NOT ENFORCING THE CONTRACT ACCORDING TO ITS TERMS

(1) *Construction of the contract.*—A preliminary question should be mentioned, if only to remove it from the area of contention between the parties. There is no dispute as to the proper construction of the contract. The Court of Claims held, and petitioner here accepts such construction (Pet. Br. page 8, footnote), that under Paragraph 7 of the contract, liquidated damages (at the rate specified in Paragraph 9) were to be imposed if the eggs were not inspected and ready for delivery on May 18, 1942, even though petitioner should have them ready when the FSCC requested delivery and should make immediate delivery upon such request.[5]

(2) *Statutory authority for the contract.*—It cannot be doubted that those who entered into the contract on behalf of the United States were fully authorized by law to include provisions for liquidated damages such as that here involved.

[5] Petitioner has abandoned its contention made in the court below, that Paragraph 7 was simply an admonition to have the eggs ready by May 18, 1942, since they might be called for at any time thereafter, and that Paragraph 9 imposed liquidated damages only in the event that there was a failure to deliver the eggs when called for. Judge Jones in his dissent adopted this view (R. 39–40), but it was rejected by the majority of the court below (R. 36–37).

The authority to make the contract derived from two sources: (a) Section 3 (a) of the Lend-Lease Act of 1941, 55 Stat. 31, and (b) Paragraph 3 (r) of the Charter of the Federal Surplus Commodities Corporation, S. Doc. 86, 79th Cong., 1st Sess., p. 395.

(a) Section 3(a) of the Lend-Lease Act of 1941 provided as follows:

> Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—
>
> (1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, *or otherwise procure*, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, *any defense article* for the government of any country whose defense the President deems vital to the defense of the United States.
>
> (2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, * * * [Italics added.]

(b) The Federal Surplus Commodities Corporation, first organized as the Federal Surplus Relief Corporation[6] was a nonprofit membership

[6] The F. S. R. C. was organized under the laws of Delaware, as a nonprofit corporation with no capital stock, on October

corporation incorporated under the laws of the State of Delaware. The broad powers granted it by paragraph 3 of its charter included the following:

* * * * *

(r) To sell, deal in, store, handle, process, transport, deliver, and/or accept delivery of agricultural and/or other commodities and/or products thereof and/or to make contracts for the purchase or sale of the same, by itself or through subsidiaries or other agencies or to act as agent, broker, shipper, consignee, consignor, trustee, or factor with respect thereto and as such agent, broker, shipper, consignee, consignor, trustee, or factor, to buy, sell, deal in, hypothecate, pledge, mortgage, store, handle, process, transport, manufacture, deliver, or accept delivery of the aforesaid commodities and/or products thereof and/or to make contracts for the purchase or sale of the same on behalf of the owner

3, 1933, pursuant to the broad powers granted the President by the N. I. R. A. (Paragraph (b) of Section 2 of Title I and Subsection (a) of Section 201 of Title II), which authorized the President to delegate any of his powers and functions to such agencies as he might designate. On November 16, 1935, the name of the F. S. R. C. was changed to the Federal Surplus Commodities Corporation.

thereof and to fix and collect and deduct all charges for such services.

By the Act of June 28, 1937, 50 Stat. 323, Congress recognized the Corporation as an agency of the Federal Government and extended it as such, under the direction of the Secretary of Agriculture, until June 30, 1939. The Act of February 16, 1938, 52 Stat. 38, authorized the continuation of the Corporation as an agency of the United States until June 30, 1942. Joint Resolution 311 of June 27, 1942, 56 Stat. 461, provided "That the Federal Surplus Commodities Corporation is hereby continued as an agency of the United States, under the direction of the Secretary of Agriculture until June 30, 1945."

Prior to the Act of June 28, 1937, *supra*, the Corporation had acted as an independent agency of the Government not directly responsible to any Department. Subsequent to the enactment of that Act, however, the Corporation, designated an agency under the control of the Secretary of Agriculture, was administered as a regular bureau of that Department.[7] By Section 5 of the Reor-

[7] The Act of April 7, 1934, 48 Stat. 528, authorized the Secretary of Agriculture to make advances to the F. S. R. C. for the purchase of dairy and beef products for relief purposes. The Act of August 24, 1935, 49 Stat. 750, 776, made the

ganization Act of 1939, 54 Stat. 1232, "The Division of Marketing and Marketing Agreements of the Agricultural Adjustment Administration of the Department of Agriculture and its functions and the Federal Surplus Commodities Corporation as an agency of the Department of Agriculture and its functions are consolidated into an agency in the Department of Agriculture to be known as the Surplus Marketing Administration. The Surplus Marketing Administration shall be headed by an Administrator, who shall be appointed by and subject to the direction and supervision of the Secretary of Agriculture."[8]

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appropriation authorized by the Act of April 7, 1934, *supra*, available until June 30, 1936. The Act of February 11, 1936, 49 Stat. 1109, 1117–1118, provided that in carrying out Section 32 (2) of the Act of August 24, 1935, *supra*, purchase for donation to the F. S. C. C., during the fiscal years 1936 and 1937 could be made without regard to R. S. 3709. The Act of June 22, 1936, 49 Stat. 1597, 1647–1648, prohibited the F. S. C. C. from incurring any obligations for administrative expenses after June 30, 1937, except pursuant to a specific annual appropriation, and further discontinued its functions as an agency of the United States after that date unless Congress provided otherwise.

[8] In an opinion dated August 8, 1940, the Solicitor of the Department of Agriculture (Op. Sol. 2661), after reviewing the basic legislation under which the reorganization had taken place and the type of reorganization set up thereunder by the President, concluded that the Federal Surplus Commodities Corporation, as an agency of the Government, was not abolished by such consolidation, but that it was made an arm of the Surplus Marketing Administration and that its operations were brought under the immediate administration, supervision, control, and direction of the Administrator of the Surplus Marketing Administration. The

Pursuant to Section 1 of the First War Powers Act of 1941, 55 Stat. 838, the text of which is set forth in the footnote,[9] the President on February 23, 1942, issued Executive Order 9069 (7 F. R. 1409) which provided in part:

> 1. (a) The Surplus Marketing Administration (including the Federal Surplus Commodities Corporation as an agency of the Department of Agriculture), the Agricultural Marketing Service (except the Agricultural Statistics Division), and the Commodity Exchange Administration of the Department of Agriculture and their functions, personnel, property, and records are consolidated into an agency to be known as the Agricultural Marketing Administration of the Department of Agriculture, which agency shall be administered under the direction and supervision of such officer as the Secretary of Agriculture shall designate.
>
> * * * * *
>
> 6. This order shall remain in force during the continuance of the present war and for six months after termination thereof.

Administrator of the Surplus Marketing Administration was the President of the Corporation. Other employees of the Surplus Marketing Administration were officers of the Corporation. The Corporation had no officers who were not employees of the Department of Agriculture. The Corporation had no employees or payroll. Employees of the Surplus Marketing Administration were authorized to function for and in the name of the Federal Surplus Commodities Corporation in the operation of certain programs conducted in the name of the Federal Surplus Commodities Corporation.

[9] "That for the national security and defense, for the successful prosecution of the war, for the support and mainte-

Upon the passage of the Lend-Lease Act of March 11, 1941, the Secretary of Agriculture deemed it advisable to set up a single agency within that Department which would acquire the stocks of agricultural supplies necessary to meet the Department's requirements under the lend-lease program. Since the Federal Surplus Commodities Corporation and its predecessor, the Federal Surplus Relief Corporation, had been making extensive purchases of surplus commodities since 1933, this unit, subsequently designated the Surplus Marketing Administration (see note 6, *supra*), was selected as the agency to perform these functions. 1941 Annual Report, Secretary of Agriculture, pp. 124–125.

(3) *The circumstances in which the contract was made.*—The circumstances in which this contract was made are important because of their

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nance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be published in accordance with the Federal Register Act of 1935."

bearing upon the reasonableness of the liquidated damages provision. This contract was only one of a large number of similar agreements. Shortly after the enactment of the Lend-Lease Act of March 11, 1941, the United States embarked on a program of purchasing dried eggs for shipment to Great Britain and subsequently to the Soviet Union. The shipment of whole eggs had proved impractical both because of their bulk and susceptibility to breakage and spoilage.[10] Accordingly, the Department of Agriculture, in cooperation with the industry, made extensive plans for production and purchase of dried eggs. Commencing in April 1941 and at various times thereafter, the United States, acting through the AMA, published announcements, invited offers, and made contracts for the purchase of dried egg products similar to the contract here involved. Under the Lend-Lease Act definite commitments had been

[10] Report on the First Year of Lend-Lease Operations (Fourth Quarterly Report), p. 22. That report also stated that domestic manufacturers had been encouraged to increase egg drying capacity from 20 million to 225 million pounds per year. *Ibid.* *In the Eighth Quarterly Report to Congress on Lend-Lease Operations* a year later, it was stated (p. 35): "Prior to lend-lease, there were 18 egg-drying plants in the United States with a capacity of 10,000,000 pounds annually; today there are 94 plants with an annual capacity of 315,000,000 pounds and 29 plants under construction which will increase capacity to 400,000,000 pounds. Some 259,000,000 pounds of these dried eggs have already been purchased for lend-lease purposes."

made for the shipment of egg products to Great Britain and the Soviet Union.

The program was affected by the shipping situation and had to be correlated with it. It is a matter of common knowledge that shipping space during the period here involved was at a premium. Ship losses were heavy and it was imperative that no vessel depart with unfilled space because of the failure of a producer to have his product ready by the time specified in his offer. In order to meet its commitments under the lend-lease program, the United States had to have available for shipment all supplies for which it had contracted, as the survival of Great Britain and, to a perhaps lesser degree, of the Soviet Union depended to no small extent upon the ability of the United States to help meet the minimum food requirements of those countries."[11]

[11] "Food has an important place in the lend-lease program. Food is a weapon of war. In its way, it is as essential to winning the war as planes or guns. * * *

"In this war England is again vulnerable on the food front because it must import a large percentage of its food. * * *

"Strict rationing was introduced early in the war which reduced average British consumption of fats, meat, fish and many other foods to two-thirds of the pre-war level. The British people have been limited to a dull diet which affords little choice or variety but which has a minimum nutritive standard high enough in calories to maintain the intensive British war effort. This result has been achieved, in spite of the sharp reduction in quantity and variety, because of lend-lease shipments of dried and concentrated foods from the United States. These bulked small in terms of shipping space, but large in proteins and vitamins. * * * Dried

In short, it was essential that the United States have on hand and ready for shipment supplies of egg products so that it could utilize to the maximum the available shipping space (R. 31).

The dried eggs wherever possible were shipped directly from the producer to the port of shipment and loaded on the vessels. Frequently, expected vessels were delayed in arriving or never arrived and it became necessary to place the dried eggs in cold storage. At times, the dried egg powder was shipped to packing plants for packaging in small containers suitable for consumers' use. Occasionally, cold-storage warehouses and packing plants were loaded to capacity and, notwithstanding the desirability of moving the egg powder at the earliest practicable date, it was necessary to delay the issuance of shipping instructions because of these temporary conditions. To meet this situation, Paragraph 7 provided in effect that shipping instructions could be given on any day within ten days after the contract delivery date.[12] The purpose of this ten days' option period was to give the FSCC some leeway for meeting any critical shipping

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eggs are rationed at a rate equivalent to four eggs per person per month." *Report to the 78th Congress on Lend-Lease Operations, From the Passage of the Act, March 11, 1941, to December 31, 1942* (Ninth Quarterly Report), pp. 42, 46.

[12] The exact language is "a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option." (R. 22.)

and storage conditions that might arise. (R. 31–32.)

The Department of Agriculture had over a year's experience in procuring dried eggs for lend-lease, and petitioner, which had commenced the manufacture of dried eggs in 1941 and did a very large amount of such business with the Government under contracts with FSCC both before and after April 18, 1942, was fully familiar with the program, the details of Government operation, and the relationship of the program to the war effort (R. 32). The parties at the time of entering into the contract agreed upon the necessity of having the egg products delivered on schedule. A complete breakdown in this and correlated lend-lease programs would have caused irreparable damage. Realizing the urgency here involved, the parties fixed certain varying sums per pound as estimated damages for failure to deliver the eggs as set forth in the bid.[13] Presumably petitioner and other bidders took into consideration the costs that would be

[13] Two elements entered into the prospective calculation of damages which ranged from 10 cents where the failure to deliver occurred within 50 days of the acceptance date to 30 cents where the breach occurred between the 246th and 311th day after the acceptance date (R. 23); one represented the estimated damage resulting from the interruption of the Government's scheduled program; and the second the estimated increased cost per pound at which dried eggs could be purchased. The second envisaged a steady increase in the cost of raw eggs and was geared to the elapsed time after the acceptance date.

involved in having their products inspected and ready for delivery by a certain date, and the damages that would follow for late performance, and bid accordingly. *Pacific Hardware Co.* v. *United States,* 49 C. Cls. 327, 334; *American Engineering Co.* v. *United States,* 24 F. Supp. 449, 454 (E. D. Penn.); cf. *Ellicott Machine Co.* v. *United States,* 43 C. Cls. 232, 236.

(4) *The purpose and effect of the liquidated damages provision.*—We shall discuss later (*infra,* pp. 28–36) the question whether enforcement of the liquidated damages provision in the circumstances of this case would, as petitioner urges, do violence to fundamental principles in the law of contracts. Here we pause briefly merely to note our agreement with petitioner's statement (Brief, p. 11), indisputably supported by the authorities, that the validity of such a provision is judged as of the time of the making of the contract. *United States* v. *Bethlehem Steel Co.,* 205 U. S. 105, 120–21; *Wise* v. *United States,* 249 U. S. 361, 365; Williston, Contracts (revised edition) § 777. This case is to be decided, therefore, precisely as it would have been had it arisen in 1942, instead of five years later. And we submit that, judged by the standards of necessity and reasonableness appropriate to the successful execution of a Government food procurement program in time of war, the liquidated damages provision in this contract was entirely reasonable and proper, and should not be denied enforcement.

As has been stated (*supra*, p. 21), the Government's program for the purchase of dried egg products to alleviate the food shortages of our European allies was begun in April 1941. Prior to February 25, 1942, contracts made pursuant to this program contained no provisions for liquidated damages. At that time such provisions were included in the contracts because of the shipping situation, which was then becoming progressively more serious (R. 31). As the Court of Claims found, "The urgency related to time and not to considerations of cost. * * * The underlying and important reason for the [liquidated damages] provision, however, was to assure the receipt of the product at the times specified in the contracts. The clause was inserted to encourage the producers of the dried egg products to have the products available on the dates for which contracted." (*Ibid.*)

Since time was of the essence, the Government obviously was not bargaining for causes of action for liquidated damages. What did concern the Government, and most vitally, was that there should be deliveries on schedule; and that the products should be ready for delivery on the dates specified in the contracts so that they could promptly be shipped if a vessel were available to transport them. Recovery of liquidated damages from contractors, no matter how large in amount, could not compensate the Government for the irreparable—and indeed unmeasurable—

damage to the war effort which would result from a ship's leaving for Europe with its hold partially empty.

We may consider what the practical consequences would have been in 1942 if this Court had upheld petitioner's argument. Petitioner contends that its failure to have its product ready for delivery on May 18, 1942, was at most only a "technical" breach not resulting in damage to the United States, and that the liquidated damages provision should not be enforced since petitioner in fact promptly made delivery upon being notified to do so. But petitioner's argument, if accepted, would frustrate the very purpose of the liquidated damages provision, which was intended to give the Government substantial assurance that contractors would not disrupt the timetable of war shipments by making tardy deliveries. A contractor is obviously much more likely to deliver on time if he knows that he will have to pay liquidated damages if his goods are not ready for delivery on the date specified in the contract. If a contractor could risk a "technical" breach in failing to have his goods ready for delivery on the promised date, in the hope that his tardiness would cost him nothing if it should develop that the Government did not call for delivery on that date, it would inevitably increase the number of such failures when the Government did call for the goods. A contractor who is running behind in his production schedule might well gamble on

being late in having his goods ready for delivery, taking the chance that the Government might not actually be damaged in his particular case, and that he would, therefore, not have to pay liquidated damages. But this is precisely what the liquidated damages provision was intended to prevent; it discouraged contractors from taking this gamble which in some cases, at least, would result in tardy deliveries which would in fact produce irreparable damage to the war effort.

Viewing the situation as it appeared in 1942, therefore, the liquidated damages provision was wholly reasonable as applied to "technical" breaches consisting of failure to be ready to deliver on the promised date. The liquidated damages provision had to be enforced in the case of such failures, even where in the particular circumstances they might not be harmful to the war effort, in order to deter such failures where they might be harmful. We submit that this function of the liquidated damages provision, no matter what label be applied to it, was reasonable in the circumstances in which these contracts were negotiated. And it may also be assumed that Government contractors who voluntarily agreed to such a provision took it into consideration in submitting their bids.

(5) *Validity of the liquidated damages provision, even as measured by principles of contract law which petitioner urges.*—We have already shown that (1) the contract, voluntarily agreed

to by both parties, expressly imposed liquidated damages upon petitioner for failure to have its product inspected and ready for delivery on May 18, 1942; (2) the contract was fully authorized by law; (3) the provision for liquidated damages was entirely reasonable and proper, in light of the circumstances in which the contract was made and was to be carried out; and (4) viewing the situation as it existed during the war when contracts of this character was negotiated, judicial refusal to enforce the liquidated damages provision would frustrate the purpose of the provision in correlating the food procurement program to the then acute shipping situation.

Petitioner argues, nevertheless, that enforcement of the provision would conflict with the fundamental principle in the law of contracts that courts will not enforce penalties. Petitioner contends that its failure to have its product ready for delivery on May 18, 1942 was only a "technical" breach of contract not resulting in damage to the United States, and that a stipulation for liquidated damages for a future breach cannot be enforced unless it reflects a reasonable forecast of the damage likely to result from that breach. It may be noted that petitioner fails to cite any specific rule of federal law which precludes the United States in time of war from entering into a valid enforceable agreement for the sale and delivery of essential war supplies, and which provides that the seller must pay liquidated damages

if he should fail to have supplies ready for delivery on the date specified in the contract. It may well be doubted, therefore, whether the general principle upon which petitioner relies can be made the basis for striking down a provision in a Government contract entered into pursuant to authority granted by Congress, and which has been voluntarily accepted by both parties. But, in any event, we submit that the liquidated damages provision in this case is valid even as judged by the criteria which petitioner urges.

The doctrine which forbids courts to enforce penalties and forfeitures is, as Professor Williston states, "a principle of somewhat vague boundaries". Williston, Contracts (rev. ed.) § 769. While courts have had considerable difficulty in distinguishing between valid provisions for liquidated damages and invalid provisions for penalties, Professor Williston has formulated the essential difference between them as follows (*id.*, § 776):

> A penalty is a sum named, which is disproportionate to the damage which could have been anticipated from breach of the contract, and which is agreed upon in order to enforce performance of the main purpose of the contract by the compulsion of this very disproportion. It is held *in terrorem* over the promisor to deter him from breaking his promise. Liquidated damages, on the other hand, is a sum fixed as an estimate made by the parties at the

> time when the contract is entered into, of the extent of the injury which a breach of the contract will cause. * * *

In essence, petitioner would measure the validity of the liquidated damages provision in this case by its reasonableness in relation to the damage sustained by the Government as a result of petitioner's breach. We have already shown that the Government did suffer damage where contractors failed to be ready to deliver on the specified contract date, even though in some particular cases the contractor might, as here, subsequently be ready to deliver in response to the Government's request. In determining whether the liquidated damages provision, as such, is unenforceable as a penalty, the Court should not limit its inquiry to what happened in this particular case. The matter must be considered from the standpoint of the Government which entered into a whole class of contracts of this type. And, as we have shown above, a failure to be ready to deliver, without more, created so serious a risk of disrupting the delicately adjusted time-table of war shipments, that the Government was in a real sense damaged by every such breach on the part of contractors. That the damage was intangible, and perhaps imponderable in character, did not make it any the less real. The parties themselves recognized this by the express terms of the contract. Paragraph 9 stated that "because of the urgent need for the commodity by the pur-

chaser arising from the present emergency conditions", failure of petitioner to perform its delivery obligations under the contract would "cause serious and substantial damages" to the Government, the amount of which, however, "will be difficult, if not impossible, to prove"; that petitioner therefore agreed to pay a schedule of liquidated damages ranging from 10 to 30 cents per pound, depending upon lapsed time between and the acceptance date and the contract delivery date (i. e., May 18, 1942); that such specified sums were agreed upon "as liquidated damages and not as a penalty"; and that the parties computed and agreed upon the sums named "as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result" (R. 22–23).

We submit, therefore, that judging the contract as of the time it was made, the liquidated damages provision was not unreasonable in relation to the damage which might have been sustained by the Government as a result of petitioner's breach in failing to be ready to deliver on the specified contract date. The principle which restrains courts from enforcing penalties is equitable in origin and character. Williston, *supra*, §§ 774–775. The principle is one, therefore, which cannot be applied with mechanical rigidity. It calls for consideration of all the relevant factors, taken as a whole. In *Clydebank Engineering and*

Shipbuilding Co., Ltd. v. *Castaneda*, [1905] A. C. 6, Lord Robertson observed that all provisions for liquidated damages are penal in the sense of deterring a breach of obligation. "But the clear presence of this element does not in the least degree invalidate the stipulation. The question remains, Had the respondents no interest to protect by that clause, or was that interest palpably incommensurate with the sums agreed on?" *Id.*, at 20. To put that question is, as in the *Clydebank* case, to answer it. The United States unquestionably had an interest in having its contractors ready to deliver on the dates specified in their contracts; and it was, equally unquestionably, damaged by their failure to live up to their obligation.

We submit, moreover, that the decisions of this Court make it clear that, irrespective of the rule in other jurisdictions relating to contracts between private parties, the manifest intention of the parties is controlling in determining whether a disputed provision in a Government contract constitutes "liquidated damages" or a "penalty". In *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, at 119, the Court said:

> The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved

> could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. This whole subject is reviewed in *Sun Printing & Publishing Association* v. *Moore,* 183 U. S. 642, 669, where a large number of authorities upon this subject are referred to. The principle decided in that case is much like the contention of the Government herein. The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out. * * *

And in *Wise* v. *United States,* 249 U. S. 361, 365–366, the Court reaffirmed and elaborated upon the basis of its earlier holding in the *Bethlehem* case:

> The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in *Sun Printing & Publishing Association* v. *Moore,* 183 U. S. 642, applied in *United States* v. *Bethlehem Steel Co.,* 205 U. S. 105, and the result of the modern decisions was determined to be that in such cases courts

will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment, of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

There are, no doubt, decided cases which tend to support the contention advanced by appellant, but these decisions were, for the most part, rendered at a time when courts were disposed to look upon such provisions in contracts with disfavor and to construe them strictly, if not astutely, in order that damages, even though termed liquidated,

> might be treated as penalties, so that only such loss as could be definitely proved could be recovered. The later rule, however, is to look with candor, if not with favor, upon such provisions in contracts when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights, as promoting prompt performance of contracts and because adjusting in advance, and amicably, matters the settlement of which through courts would often involve difficulty, uncertainty, delay and expense. * * *

It is submitted, therefore, that, unless a liquidated damages stipulation in a Government contract is fraudulent, oppressive, unconscionable, or for any other reason inequitable for a court to enforce, the decisions of this Court uphold the view expressed by Sir George Jessel in *Wallis* v. *Smith*, 21 Ch. D. 243, 266, that courts "should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves." Here there is no question as to the intention of the parties; nor is there any justification for judicial refusal to carry out the parties' agreement according to the terms which both voluntarily accepted. Cf. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184, 190; *Robinson* v. *United States*, 261 U. S. 486; *United States* v. *Walkof*, 144 F. 2d 75 (C. C. A. 2).

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
PEYTON FORD,
Assistant Attorney General.
PHILIP ELMAN,
Special Assistant to the Attorney General.
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Attorneys.

OCTOBER 1947.

APPENDIX

(1) Section 3 (a) of the Lend-Lease Act of 1941, 55 Stat. 31, provided as follows:

> Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—
>
> (1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, *or otherwise procure*, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, *any defense article* for the government of any country whose defense the President deems vital to the defense of the United States.
>
> (2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, * * * [Italics added.]

(2) Announcement FSC–553 (R. 19–24), which, by its terms, became a valid and binding contract between petitioner and the Federal Surplus Commodities Corporation upon the acceptance of petitioner's offer, provided in pertinent part:

ANNOUNCEMENT FSC–553

Purchase of Dried Egg Products

(Supersedes Announcement FSC–450)

The Agricultural Marketing Administration announces that it will receive and consider offers for the sale of the following dried egg products, which may for convenience be referred to by their identifying letters:

Product A. Spray dried whole egg.

* * * * *

Offers submitted pursuant to this announcement will be accepted by, and after acceptance will become contracts with, the Federal Surplus Commodities Corporation.

* * * * *

Terms and Conditions

In submitting an offer of sale, the following terms and provisions of this announcement shall become a part of the offer to sell, and upon acceptance by the Federal Surplus Commodities Corporation, hereinafter referred to as FSCC, the offer and acceptance shall constitute a valid and binding contract.

* * * * *

PAR. 7. *Delivery.*—The date specified in the offer, pursuant to item C, shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option. Save for the exception noted below, failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer will be cause for invoking the provisions of Paragraph 9 below. The only exception against invoking the provisions of Paragraph 9 shall be when sampling and inspection by the Agricul-

tural Marketing Administration had been requested for a date at least 10 days prior to the date specified in the offer, pursuant to item C and the sampling and inspection services were not forthcoming.

Dried eggs tendered for delivery must be accompanied by the original and two copies of the inspection and weight certificate issued by the Agricultural Marketing Administration and other affidavits and statements stipulated in this announcement. Vendors shall take whatever steps are necessary to protect fully the dried egg products prior to delivery to the FSCC. Such protection within the prescribed delivery period shall be at the expense of the vendor.

Delivery shall be made at the point (or points) specified in the offer, f. o. b. railroad cars, or, at the option of the FSCC, f. o. b. truck or local warehouse specified by the FSCC.

* * * * *

PAR. 9. *Delays—Damages: Payment.*—Inasmuch as the failure of the vendor to deliver the quantity of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below for each

pound of dried egg product undelivered in accordance with the terms of this announcement.

Contracted delivery date (date specified in offer):	Liquidated damage sum
Within and including 50 days of acceptance date	$0.10
51 to 115 days from acceptance date, inclusive	.15
116 to 180 days from acceptance date, inclusive	.20
181 to 245 days from acceptance date, inclusive	.25
246 to 311 days from acceptance date, inclusive	.30

The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result. However, if the President of the Federal Surplus Commodities Corporation determines that the failure to make delivery as herein agreed results from unforeseeable causes and without the fault or negligence of the vendor, the President of the Federal Surplus Commodities Corporation, upon request of the vendor, may extend the time for making delivery for such time as he deems reasonable under the circumstances and in view of the urgent needs of the purchaser. The President may delegate to any officer or employee or agent of the Federal Surplus Commodities Corporation the power herein given to determine whether the failure to deliver is due to unforeseeable causes beyond the control and without fault or negligence on the part of the vendor, and the determination of the President of the Federal Surplus Commodities Corporation or such officer or employee or agent in this respect shall be final and conclusive on the parties concerned.

Payment of vendor's invoice will be made as soon as practicable after submission of a correct

claim or claims, and payment will be contingent upon compliance with conditions set forth in this announcement.

PAR. 10. *Contract of sale.*—This announcement, together with the offer and acceptance, shall constitute the contract of sale between the vendor and the Federal Surplus Commodities Corporation.

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUPREME COURT OF THE UNITED STATES

No. 16.—October Term, 1947.

Priebe & Sons, Inc., Petitioner, v. The United States. } On Writ of Certiorari to the Court of Claims.

[November 17, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

This case, here on certiorari to the Court of Claims, presents the question whether a provision in a government contract for "liquidated damages," as construed and applied, should be denied enforcement on the ground that it constitutes a "penalty."

Shortly after the enactment of the Lend-Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. Supp. V, § 411 et seq., the United States acting through agencies of the Department of Agriculture embarked on a program of purchasing dried eggs for shipment to England and Russia. Petitioner agreed to furnish a quantity of dried eggs under that program to the Federal Surplus Commodities Corporation (FSCC). The contract called for "May 18 [1942] delivery" which date, according to the contract, "shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option." Petitioner was also required to have the eggs inspected, delivery to be accompanied by inspection and weight certificates.

The contract contained two provisions respecting "liquidated damages." One, contained in paragraph 9, was applicable to delays in delivery.[1] It has no application

[1] That provision of the contract provided:

"Inasmuch as the failure of the vendor to deliver the quantity of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need

here, for as we shall see, deliveries were timely. The provision for "liquidated damages" with which we are concerned is contained in paragraph 7 and is applicable to a totally different situation. It provides, with exceptions not material here, that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer" will be cause for payment of "liquidated damages."[2]

On May 18, 1942, petitioner had not made delivery nor had the eggs been inspected. Inspection was, however, completed and certificates issued by May 22, which was prior to the time when FSCC asked for delivery. For it was not until May 26 that FSCC gave the first of several written notices for the shipment of eggs involved in this litigation. Petitioner made timely shipments pursuant to those instructions. Subsequently FSCC ascertained that petitioner's inspection certificates had been issued after May 18 and accordingly deducted from the price 10 cents per pound on the theory that the failure to have the eggs inspected and ready for delivery by May 18 was a default which put into operation the "liquidated damages" provision of the contract.

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for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty, and shall be in the amount set forth below for each pound of dried egg product undelivered in accordance with the terms of this announcement. * * * The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result."

The "liquidated damages" ranged from 10 to 30 cents per pound dependent upon the elapsed time between the acceptance date and May 18, 1942.

[3] The measure of "liquidated damages" in this situation was the same as that for delays in delivery set forth in note 1, *supra*.

Petitioner brought this suit in the Court of Claims to recover the amounts withheld plus interest. The Court of Claims, being of the view that there had been a breach of contract for which the United States was entitled to "liquidated damages," dismissed the petition. 65 F. Supp. 457.

We construe the contract to mean that the time for delivery by petitioner was not May 18, 1942 but the time or times chosen by the FSCC within the ten-day period which began on May 18. That is to say, performance by petitioner was not due until request was made and instructions given for delivery. That interpretation is in accord with the uncontested finding of the Court of Claims that petitioner promised delivery "within a ten-day period commencing May 18, the precise date to be selected" by the FSCC.

The contract was drawn, however, to make the "liquidated damages" provisions include so-called defaults of petitioner which antedated the time when delivery was due but which in no way interfered with or caused delay in that performance. As noted, "liquidated damages" became payable on "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer," viz. by May 18, 1942. The Court of Claims held this provision enforceable even though petitioner had made prompt delivery of the eggs, because it felt that the provision enabled respondent to carry on its dried-egg program "with assurance that it could count on the dried-egg products being ready on the specified date." That position is amplified by respondent. The argument in short is that liability to pay "liquidated damages" for failure to have goods ready for delivery even prior to the time when delivery is due gives assurance against tardy deliveries; that a prompt timetable of shipments was important here because of war conditions and the necessity of having goods ready for loading whenever shipping space was available; that

delay in deliveries would cause unmeasurable damage; and that even though no damage were apparent in a particular case, the "liquidated damages" provision should be enforced as a deterrent of tardy deliveries in the whole class of contracts relating to this procurement program.

It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law. *United States* v. *Standard Rice Co.*, 323 U. S. 106, 111, and cases cited. That has been done in other cases where the Court has considered the enforceability of "liquidated damages" provisions in government contracts. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 120–121; *Wise* v. *United States*, 249 U. S. 361, 365–366. We adhere to those decisions and follow the same course here.

Today the law does not look with disfavor upon "liquidated damages" provisions in contracts. When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. *Wise* v. *United States*, *supra*, p. 365; *Sun Printing & Pub. Assn.* v. *Moore*, 183 U. S. 642, 672–674; Restatement, Contracts § 339; *Dunlop Pneumatic Tyre Co.* v. *New Garage & M. Co.* [1915] A. C. 79. And see *Kothe* v. *Taylor Trust*, 280 U. S. 224, 226. They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. *United States* v. *Bethlehem Steel Co.*, *supra*, p. 121; *Clydebank Engineering & Shipbuilding Co.* v. *Castaneda* [1905] A. C. 6, 11–13, 20; *United States* v. *Walkof*, 144 F. 2d 75, 77. And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract. *United States* v. *Behlehem Steel Co.*, *supra*, p. 121.

Judged by these standards, the provision in question may not be sustained as an agreement for "liquidated

damages." It does not cover delays in deliveries.[3] It can apply only where there was prompt performance when delivery was requested but where prompt delivery could not have been made, due to the absence of the certificates, had the request come on the first day when delivery could have been asked. A different situation might be presented had the contract provided for notice to the Government when the certificates were ready. Then we might possibly infer that promptness in obtaining them served an important function in the preparation of timetables for overseas shipments. But the contract contains no such provision; and it is shown that FSCC had no knowledge that the certificates were not ready on May 18 until long after deliveries had been made. So, it is apparent that the certificates were only an essential of proper delivery under this contract.

It likewise is apparent that the only thing which could possibly injure the government would be failure to get prompt performance when delivery was due. We have no doubt of the validity of the provision for "liquidated damages" when applied under those circumstances. *United States* v. *Bethlehem Steel Co., supra; Wise* v. *United States, supra.* And see *Maryland Dredging Co.* v. *United States,* 241 U. S. 184; *Robinson* v. *United States,* 261 U. S. 486. But under this procurement program delays of the contractors which did not interfere with prompt deliveries plainly would not occasion damage. That was as certain when the contract was made as it later proved to be. Yet that was the only situation to which the provision in question could ever apply. Under these circumstances this provision for "liquidated damages" could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract. It might, as respondent suggests, have an

[3] They are covered, as we have already noted, by the provision set forth in note 1, *supra.*

in terrorem effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is well-settled contract law that courts do not give their imprimatur to such arrangements. See *Kothe* v. *Taylor Trust*, *supra*; Restatement, Contracts § 339. All provisions for damages are, of course, deterrents of default. But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust. See Salmond & Williams on Contracts (2d ed. 1945) § 202.

It is said, however, that a different rule should obtain here because of the broad procurement powers involved under the Lend-Lease Act. We are pointed, however, to no provision by which the Congress authorized the imposition of penalties as sanctions to that program; nor do we find any. We cannot infer such a power. The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase. But if that is the source of Congressional authority to impose penalties, then any procurement officer, in war or in peace, could impose them. That is contrary to the premise underlying all our decisions on this question which involve government contracts. The rule which they announce has been applied both to the exigencies of war (*United States* v. *Bethlehem Steel Co.*, *supra*) and of peace (*Wise* v. *United States*, *supra*). The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the Congressional purpose should be plain before we take the step.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 16.—October Term, 1947.

Priebe & Sons, Inc., Petitioner, v. The United States.	On Writ of Certiorari to the Court of Claims.

[November 17, 1947.]

Mr. Justice Black, with whom Mr. Justice Murphy agrees, dissenting.

The Court today invokes elusive and uncertain principles of "general contract law" to strike down a clause in a Government contract executed under the recognized congressional authority of the Lend-Lease Act. Without reliance upon any indication of congressional policy, the Court assumes that it can discover somewhere a "general contract law," and that it is empowered to apply this law to wartime contracts of the Federal Government. I regard the decisions of this Court since *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, as having established that the construction and validity of *all* Government contracts are governed by federal law, whether executed under authority of the Lend-Lease Act or any other. *Metropolitan Bank* v. *United States*, 323 U. S. 454, 456; *see United States* v. *Allegheny County*, 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. And Congress has enacted many laws, both general and specific in nature, to guide all contracting agents of the Federal Government, 41 U. S. C. §§ 1 *et seq.*, as well as many detailed rules applicable solely to certain categories of contracts. *See, e. g.*, Merchant Marine Act of 1936, 49 Stat. 1985, tits. 5, 7, 8. But I can find no act of Congress which expressly or impliedly prohibits such generally authorized agents from making a contract containing a liquidated damage provision such as here involved. Nor has Congress ever intimated that contracts within the general powers of Government agents should be in-

validated by this Court's invocation of a nebulous "general contract law," or because such contracts failed to harmonize with this Court's views of what is "fair and reasonable." I had not supposed that the federal courts were vested with such supervisory and revisory powers over the terms of contracts voluntarily and advisedly entered into by business groups with congressionally authorized Government agents.

The available indications of congressional policy point to the very opposite conclusion. Far from indicating a hostility to liquidated damage clauses, Congress has made it mandatory that such clauses to protect against delay in performance be inserted in all Government building contracts; and it has provided that such clauses "shall be conclusive and binding upon all parties" without the necessity for the Government to prove "actual or specific damages sustained . . . by reason of delays." 32 Stat. 326; 40 U. S. C. § 269. Surely this provision would not permit federal judges to ignore liquidated damage clauses in building contracts because actual damages were not proved and could not have been reasonably forecast. And in no other act of Congress is there a suggestion that liquidated damage provisions in other Government contracts are unenforceable because the courts believe no actual damages could be sustained from a breach. Yet the majority adopts such a principle today to invalidate a clause in this contract, and thereby, as I see it, embarks upon the very undesirable practice of supervising and revising the congressionally authorized conduct of federal contracting agents. This Court has previously refused to initiate such a practice in a case where the Government on most appealing grounds urged us to revise its agent's contract. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 308–309.

In this case procurement officers of the Federal Government, admittedly acting within their authority, adver-

tised for bids for the sale of dried eggs which the advertisement provided were to be ready for delivery to the Government on a date to be chosen by the bidder. Actual delivery of the eggs was to be made on the Government's demand any time within a ten-day period following the ready date named by the bidder. The advertisement also contained a provision for the assessment of liquidated damages for delay in delivering the eggs or in having them inspected, certified, and ready for delivery by the bidder's chosen date.

The efficient integration of a large scale procurement program, such as was here involved, made it highly advisable for the Government to exact assurances that goods would be ready for delivery in advance of selection of the date for actual delivery. Essential to the program was the coordinated movement of boxcars and ships, both of which were then scarce and in great demand. Each day's idleness of cars and ships might mean injuries to the Government of large but uncertain amounts. Under such circumstances it would have been a serious omission for Government agents to fail to check and double check, contract and double contract, in order to have goods ready for delivery to cars and ships with the least possible lost time in the use of transport facilities. And the Government had a right to depend on its contractors living up to their promise to have goods ready on the date they said they would so that the Government might thereafter select a delivery date with certainty that no transportation delays would occur. Failure to do so might well disrupt the Government's prearranged train and ship schedules, causing it cumulative difficulties not easily translated into money damages. And all of these damages might result from failure to have the goods ready as promised, even though the contractor might later be able to deliver when called for and thus escape the delivery liquidated damage provision.

This contract was made at arms' length. The petitioner knew of the necessity for faithful performance of its obligations. It undoubtedly gave consideration to this fact and fixed its price high enough to satisfy itself of its profits. I can think of no persuasive reason why it should now be relieved of the obligation it advisedly assumed which was, in effect, to charge less for its goods if they were not ready for delivery on the date it promised. I do not deny that this Court can fill gaps in statutes so as to execute broad congressional purposes and that courts generally have made large contributions to laws governing contracts. But I think that the Court here makes a law which frustrates congressional purposes and tends most unwisely to handicap Government purchasing agents in the performance of their authorized duties. I adhere to the belief that it is unwise for the courts to interfere with the making of contracts by Government agents in harmony with valid congressional authority. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–128, 131–132. I would affirm this judgment.

SUPREME COURT OF THE UNITED STATES

No. 16.—October Term, 1947.

Priebe & Sons, Inc., Petitioner, v. The United States.	On Writ of Certiorari to the Court of Claims.

[November 17, 1947.]

Mr. Justice Frankfurter, whom the Chief Justice joins, dissenting.

Upon failure to perform the undertaking of a contract the law secures the money equivalent for the loss thereby incurred. In order to avoid the waste of controversy as to the extent of a loss, should it occur, and to save judges and juries from having to guess about it, parties naturally enough, often stipulate in advance the compensation for such loss, and courts in appropriate situations will enforce such a provision for liquidated damages. But exactions for a breach of contract not giving rise to damages and merely serving as added pressure to carry out punctiliously the terms of a contract, are not enforced by courts. In familiar language, penal provisions in a contract—those that concern defaults that bring no loss in their train—are not enforceable. I assume that the basic reason for this doctrine is that the infliction of punishment through courts is a function of society and should not inure to the benefit of individuals. So-called *qui tam* actions, suits for treble damages and the like, stand on a different footing. In such situations society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation. The essence of the law's remedy for breach of contract is that he who has suffered from a breach should be duly compensated for the loss incurred by non-performance. But one man's default should not lead to another man's unjust enrichment.

If the contract in controversy is to be treated as an ordinary commercial transaction, to be governed by the ordinary rules applicable also to Government contracts in ordinary times, I could not escape the conclusion that the provision for "damages" merely for failure to secure inspection certificates without failure of delivery operates as a penalty to deter non-observance of this requirement. It is not a determination in advance of the money lost to the Government due to default. The Government wanted delivery of eggs. But failure of delivery or inability to deliver for want of certificates brings into operation the provisions for liquidated damages of paragraph 9. There is no money loss to the Government through failure of any of the intervening preparatory steps in the process leading to delivery. Of course a contractor is interested in having the steps leading to performance duly carried out. Exactions for any of the intervening steps would undoubtedly have a coercive influence in securing performance of that which is the real object of a contract. But if a contract is performed, the promisee has suffered no loss even though some intervening step by the promisor has been delayed. And so, such a provision for default of an intervening step, when due delivery has been made, is plainly exaction of an amount for which the promisee has not been out of pocket. Accordingly, if this contract were an ordinary commercial contract subject to the ordinary rules of the law of contract, I should have to find against the Government.

But this is not an ordinary peace-time Government contract. The Government may certainly assure performance of contracts upon which the effective conduct of the war depended by tightening the consequence of non-performance of each stage in the ultimate process of delivery of essential goods to the extent of having a tariff of deductions for non-performance of each step in the ultimate goal of the contract. Congress certainly could spe-

cifically authorize such pressures on each step in the sequence of a contract-performance by provisions like that of paragraph 7. Congress did not do this. Instead of particularizing to that extent, such a provision would, as a matter of fair construction, also be authorized by Congress if it empowered an agency to procure "under appropriate terms and conditions" essential war goods. I could not hold that an authority by Congress to a procurement agency to make contracts for carrying out the food program for the successful conduct of the war could not appropriately require of those who voluntarily enter into such contracts with the Government to incur a reasonable penalty for default for necessary certificates upon which delivery depended. And this would be so even though for reasons themselves relating to the war effort, the Government reserved a necessary margin of time within which to call for delivery and by a delayed call obtained delivery when required, though if the call had been previously made the failure of certification might have been serious. Congress did not add to its authorization for entering into the making of these war contracts the assumed provision "with appropriate terms and conditions." But I find the distinction between what Congress did and the indicated addition too thin for denying to the contracting officers of the Government the implied right, under the circumstances of the times. Congress authorized the President, through appropriate delegation, to "procure . . . any defense article" deemed "vital to the defense of the United States." Section 3 (a) of the Lend-Lease Act of 1941. 55 Stat. 31. And so I conclude that the provisions of paragraph 7 were, on a fair reading of Congressional legislation, within the contracting powers of the President as much so as if Congress had in terms authorized such a provision.

It hardly needs to be added that neither formal logic nor practical judgment requires that authority to impose

safeguards for preventing breaches short of ultimate default, similar to those contained in paragraph 7 of this contract for vital war products, be inferred from the ordinary-implied powers of Government contracting officers in making ordinary contracts for the Government.

If one starts with the assumption that, in the absence of specific Congressional authority, a fixed rule of law precludes contracting officers from providing in a Government contract terms reasonably calculated to assure its performance even though there be no money loss through a particular default, there is no problem. But answers are not obtained by putting the wrong question and thereby begging the real one. It is misleading to ask: "What remedies has Congress provided for breaches of contract?" The answer to that depends on the answer to the true question: "With what scope has Congress presumably invested the Executive in order to carry out the duty, not defined with particularity, of assuring the necessary war supplies?"

The enforceability of a clause like that now in controversy, regardless of whether it is fairly to be regarded as one for "liquidated damages" or for a "penalty," is a matter of appropriate implications drawn from a total absence of expressed Congressional desire. Such implications do not rest on dogma. They derive from the considerations of policy underlying them. It is one thing to attribute to Congress the desire to confine the Government's remedies for breaches of its ordinary procurement contracts to the rules of law governing ordinary commercial contracts. It is quite another thing to infer that when in March, 1941, Congress gave the President, through the Lend-Lease Act, unrestricted power to "procure" essential war materials, it meant to fetter the procurement agencies selected by the President, by forbidding them to include, among the terms of bids to be voluntarily accepted, conditions reasonably calculated to secure performance.

While Congress presumably wishes the ordinary rules of contract law to apply in ordinary times, the Lend-Lease Act was the most potent proof that the times were far from ordinary. The inclusion of paragraph 7 in contracts such as this was an appropriate regard by the Executive for the very emergency which impelled Congress to act and to give its agencies power to act.